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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1283

DANIEL MORIN, *et al.*,
Petitioners,

vs.

VICTOR S. GARRA, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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IN THE

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OCTOBER TERM, 1968

No.

DANIEL MORIN and JANET MORIN,

Petitioners,

—versus—

VICTOR S. GARRA, FELIX H. VANN, and WILLIAM C. SOULE, co-partners,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above-entitled case on December 10, 1968.

Opinions Below

The order of the Supreme Court of New Jersey, dated December 10, 1968, denying certification, is reported at 53 N.J. 82. It is printed in the Appendix, *infra*, p. 1a. The *per curiam* opinion of the Superior Court of New Jersey, Appellate Division, dated October 4, 1968, is not reported. It is printed in the Appendix, *infra*, p. 2a. The final order and opinion of the Superior Court of New Jersey, Law Division, Bergen County, dated Dec. 11, 1967, is also unre-

ported. It is printed in the Appendix to this petition, *infra,* p. 3a. The decision relied on by the New Jersey courts as substantially parallel to the instant controversy is reprinted in pertinent part in the Appendix, *infra,* p. 8a, for the convenience of this Court. It is *Gleitman* v. *Cosgrove,* 49 N.J. 22, 227 A. 2d 689 (1967). Plurality, concurring, and dissenting opinions are excerpted.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on December 10, 1968. Mr. Justice Brennan extended the time within which to file a petition for writ of certiorari to and including April 24, 1969. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

Questions Presented

I. Whether the New Jersey statute prohibiting the termination of pregnancy after conception "without lawful justification" [N.J. Stat. 2A:87-1], and the state public policy against therapeutic abortion announced in *Gleitman* v. *Cosgrove,* 49 N.J. 22, 227 A. 2d 689 (1967), were unconstitutionally applied to defeat petitioners' malpractice action against physicians who neglected to inform petitioner Janet Morin that her case of German measles (rubella) in the first trimester of pregnancy could cause serious fetal injury and that a therapeutic abortion could be obtained?

A. Whether the New Jersey statute and *Gleitman* policy operate to abridge petitioners' "right of marital privacy" recognized in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), and deprive petitioners of liberty without due process of law by broadly interfering with their fundamental personal rights on less than a showing of overriding and compelling state interest?

B. Whether the statute and *Gleitman* policy deny petitioners the equal protection of the laws by selectively precluding a particular class of malpractice actions wherein the petitioners' rights are fundamental and the state's interests insubstantial?

C. Whether the statute and *Gleitman* policy impose upon petitioners a cruel and unusual punishment by subjecting them to severe penalties because of an illness over which they had no control?

Statute Involved

2A:87-1. Causing miscarriage . . .

> Any person who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine or noxious thing, or uses any instrument or means whatever, is guilty of a high misdemeanor. * * *

Statement of the Case

Petitioners are a mother and father—Janet and Daniel Morin. Defendant Victor S. Garra is a licensed physician practicing in Bergen County, New Jersey. Defendants Felix H. Vann and William C. Soule are licensed and practicing Bergen County physicians specializing in obstetrics and gynecology.

According to petitioners' complaint and pretrial memoranda, which are taken as true in this case where summary judgment for defendants has been granted,[1] the facts

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[1] *See, e.g., Gleitman* v. *Cosgrove*, 49 N.J. 22, 26, 227 A. 2d 689, 691 (1967): "The motion for judgment of dismissal concedes for purposes of the motion the truth of plaintiff's evidence."

are as follows: Petitioner Janet Morin visited defendant Victor S. Garra at his office on or about July 4, 1964, the summer of the last major German measles (rubella) epidemic in the United States. She engaged defendant Garra to provide medical services and advice regarding her newly initiated pregnancy as well as a rash which she had at that time. Defendant Garra did not diagnose the rash as rubella, did not warn petitioner Janet Morin that rubella in the first trimester of pregnancy could cause serious and permanent deformities in the fetus, and did not inform her that under acceptable standards of medical practice therapeutic abortion might be indicated and available, either in New Jersey or elsewhere.[2] Instead he diagnosed her condition as consistent with possible rubeola with rubella to be ruled out, an indication that he suspected rubella. At no time, however, did he perform tests to detect presence of the rubella virus.

After her initial contact with defendant Garra, petitioner Janet Morin consulted defendants Vann and Soule, co-partners specializing in obstetrics and gynecology. She visited defendant Soule at his office on or about August 5, 1964, and explained to him that she was recently pregnant and had experienced a rash. Defendant Soule made no tests to detect rubella, gave no warnings of possible fetal abnormalities, and gave no indication that therapeutic abortion might be available and indicated under the circumstances. On two further occasions petitioner Janet Morin consulted with defendants Soule and Vann, but was

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[2] Recent studies have shown that as many as 90% of the embryos infected with rubella develop congenital abnormalities. Medical World News, Sept. 29, 1967, at 35 (study at Johns Hopkins University).

assured that her condition was normal and without complications.

On February 20, 1965, petitioner Janet Morin bore a son. He is afflicted with the multiple stigmata associated with fetal rubella infection including inability to talk, deafness, blindness, heart condition, and bone disease. As a consequence of defendants' actions and inactions petitioners had no opportunity to exercise choice over whether they preferred to permit this pregnancy to proceed, or to initiate another at a later date. The child himself is seriously burdened for his entire lifetime. The parents are psychologically, physically, and financially burdened in a way which must be experienced to be understood.

Petitioners brought this suit on July 5, 1966, seeking damages for malpractice. The Superior Court of New Jersey, Law Division, Bergen County, granted summary judgment in favor of defendants on December 11, 1967. Petitioners appealed, and the Superior Court, Appellate Division, affirmed, *per curiam,* holding that the "appeal [was] controlled by the decision in *Gleitman* v. *Cosgrove,* 49 N.J. 22 (1967) on a substantially similar set of facts." Petitioners appealed once more to the Supreme Court of New Jersey which denied certification on December 10, 1968.

When and How the Federal Questions Were Raised and Decided Below

At the core of petitioners' case is the claim that the New Jersey statute prohibiting therapeutic abortion "without lawful justification"[3] and the state judicial policy against tort recovery for malpractice associated with failure to in-

[3] N.J. Stat. § 2A:87-1.

form of the possibility of abortion[4] are both infringements upon petitioners' federal constitutional rights.[5]

Petitioners raised federal constitutional claims after defendants Vann and Soule answered that they "would be in danger of criminal prosecution if they attempted to perform an abortion as the plaintiffs allege they would request."[6] Petitioners, in their *Memorandum in Opposition to Motion for Judgment*,[7] pp. 32-34, relied on *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), and the several arguments in the opinions therein to support the position that *Gleitman* v. *Cosgrove*, 49 N.J. 22, 227 A. 2d 689 (1967), was incorrectly decided. The Superior Court adhered to

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[4] A plurality of the New Jersey Supreme Court, in the parallel case of *Gleitman* v. *Cosgrove*, 49 N.J. 22, 227 A. 2d 689 (1967), Appendix to this Petition, p. 8a, found that this kind of malpractice action could not be maintained because of a state public policy against abortion. They assumed that the abortion would have been legal. A concurring Justice, however, went to lengths in arguing that an abortion under these circumstances was a criminal offense. Appendix, p. 16a. The Chief Justice of the New Jersey Supreme Court argued that the statute was unconstitutional on these facts. Appendix, p. 44a.

[5] At the outset petitioners point out that the presence of controlling federal questions is not extraordinary in the context of tort actions. Only last term, for example, this Court allowed wrongful death actions by illegitimate children who had been denied relief for unconstitutional reasons in the Louisiana state and federal courts. *Levy* v. *Louisiana*, 391 U.S. 68 (1968); *Glona* v. *American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968).

[6] Appendix to Appellant's Brief in the Superior Court of New Jersey, Appellate Division, p. 23a.

[7] Petitioners have reprinted the appropriate sections from that *Memorandum* in the Appendix to this Petition, *infra*, p. 7a.

Gleitman, however, and appeared to reject petitioners' constitutional claims in the following language:[8]

> "There's no law or statute, there's no constitution which is denying to Mr. or Mrs. Morin the right to have happiness. All the law is saying is what the [New Jersey] Supreme Court said [in *Gleitman*], and I agree with that opinion . . .
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> [W]e haven't changed the Constitution of the State of New Jersey or the Constitution of the United States with its knowledge that there is something over the State which determines life and death.

Although the constitutional arguments could perhaps have been disposed of with greater explicitness, the above language indicates that the Superior Court decided the federal constitutional claims and that the arguments of this Court in *Griswold* were rejected. Moreover, the *dictum* by the Superior Court to the effect that Janet and Daniel Morin's injuries were not proximately caused by the defendants' malpractice is contrary to *Gleitman*, was discarded by the Appellate Division and cannot be regarded as an independent state ground.

Petitioners thereafter appealed to the Appellate Division of the Superior Court which affirmed, *per curiam*, relying solely on *Gleitman*. Petitioners appealed once more to the Supreme Court of New Jersey, and certification was denied.

In the appeal to the Supreme Court of New Jersey petitioners reiterated the constitutional arguments from *Griswold*, as well as additional constitutional arguments which had come to the fore in other litigation decided

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[8] Judgment and Opinion of the Superior Court of New Jersey, Law Division, Bergen County, pp. 2 and 3, Appendix, p. 5a.

after the instant case was brought.[9] Under New Jersey practice it is permissible to raise new arguments at the appellate level in order to do substantial justice.[10] In any event the New Jersey Supreme Court denied certification.

Petitioners' *Supplemental Petition for Certification and Supplemental Appendix* before the New Jersey Supreme Court more clearly bring out the full range of constitutional questions in the case. Petitioners there argued that the decisions below imposed a cruel and unusual punishment upon petitioners and violated their rights to marital privacy. It is on these arguments that the present petition principally rests.

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[9] For example, the Superior Court of San Francisco County recently found that the pre-1967 California abortion statute, CAL. PENAL CODE §274, contravened the Fourteenth Amendment's due process clause and imposed a cruel and unusual punishment upon the patients of a physician who was disciplined for unprofessional conduct after having performed therapeutic abortions upon patients inflicted with rubella. *Shively* v. *Board of Medical Examiners,* No. 590333 (Cal. Super. Ct., San Fran. Cty., Sept. 24, 1968). Petitioners included a copy of this decision in the *Supplemental Petition for Certification and Supplemental Appendix* to the Supreme Court of New Jersey, p. 1a, which is part of the record before this Court.

Similarly, the Supreme Court of New York, Kings County, recently held that a mother and father could maintain a malpractice action against a hospital which failed to disclose the fact that rubella in early pregnancy could cause serious deformities in the fetus. *Stewart* v. *Long Island College Hospital,* 58 Misc. 2d 432, 296 N.Y.S. 2d 41 (Sup. Ct., Kings Cty., 1968). Numerous constitutional arguments were raised in *Stewart,* but the court decided the case solely on state law grounds. Petitioners here enclosed a copy of the *Stewart* opinion in *Plaintiff's Reply Brief and Reply Appendix* to the Supreme Court of New Jersey, p. 1a, which is a part of the record.

[10] *See e.g., WHYY, Inc.* v. *Glassboro,* 50 N.J. 6, 231 A. 2d 608 (1967), *rev'd on other grounds,* 393 U.S. 117 (1968) (*per curiam*).

Two additional points should be stressed on the interplay between state and federal law questions in this case. The Appellate Division's result rests solely on *Gleitman* v. *Cosgrove*, 49 N. J. 22, 227 A. 2d 689 (1967), in which a divided court ruled against a family of petitioners on substantially similar facts. The *Gleitman* court did not undertake a sophisticated examination of whether an abortion for rubella indications would be illegal, whether if so the statute was unconstitutional, or what duties might be imposed upon a physician if the statute were unconstitutional under the circumstances. Apparently, however, the constitutional questions were decided *sub silentio* because Chief Justice Weintraub, in dissent, would have held the statute unconstitutional. 49 N. J. at 56-57, 227 A. 2d at 707-08.[11] What the *Gleitman* court did was to formulate a common law rule of public policy, that regardless of the legality of the abortion this particular class of malpractice defendants had no duties to inform their patients of the dangers of rubella and possibilities of therapy.[12] The claim which petitioners formulate for this Court, therefore, is that the New Jersey statute is unconstitutional, as is the *Gleitman* rule of public policy. Moreover, the selective treatment of malpractice defendants, by the very decision below, is itself a denial of

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[11] Indeed, the Supreme Court of New Jersey subsequently acknowledged that the State Chief Justice considered the statute unconstitutional when applied to the facts of this kind of case. *See Moretti* v. *New Jersey*, 52 N.J. 182, 191, 244 A. 2d 499, 504, cert. denied, 393 U. S. 952 (1968).

[12] Petitioners have alleged throughout that the accepted medical practice on these facts would have required defendants to (1) detect rubella, (2) be aware of its potential impact on the fetus, and (3) advise petitioners that alternative treatment such as therapeutic abortion might be available to them in a New Jersey hospital or elsewhere.

equal protection to petitioners. By this formulation the case turns solely on questions of federal constitutional law.

Reasons for Granting the Writ

The writ of certiorari should issue because the New Jersey courts have decided important and recurring federal questions of substance which have not been directly resolved by this Court. Moreover, the posture of the lower courts on these questions appears to be in serious conflict with the principles of applicable decisions by this Court in analogous areas.

A. The case involves unresolved federal questions of national importance.

1. The importance of this case far transcends its particular facts and the interests of the individual litigants. It raises the conflict between the state laws on abortion and the woman's interest in not being compelled to bear offspring each time she conceives. This is a conflict which will increasingly appear in petitions to this Court, and one which deserves serious and immediate attention. Its ultimate resolution will determine whether the women of these United States are to be treated as citizens with control over their reproductive capacities, or instruments of the State who must perpetuate the human race in the way specified by a majority of their state legislators.[13] The New Jersey courts have thus far made the latter choice for women within that State. A similar choice is made for women in over three-fourths of the other States of the Union. Only Arkansas, Colorado, Georgia, Mary-

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[13] *Cf. West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 638 (1943):

> "One's right to life, liberty, . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

land, New Mexico and North Carolina follow the American Law Institute's recommendation in the Model Penal Code and permit therapeutic abortion when the fetus is seriously deformed and would ultimately be born with grave congenital abnormalities.[14]

Morin is one of many cases arising from the German measles epidemic of 1964. In that year, in New York City alone for example, "the number of reported [rubella] cases exceeded 20,000 . . ."[15] Thousands of American women were infected in early pregnancy during the 1964 epidemic. An estimated 4,000 obtained therapeutic abortions.[16] Others, from lack of information, misinformation, or inadequate funds were unable to exercise a personal choice in the matter. The burden fell most heavily on the poor who are traditionally ward patients, without personal physicians, and invariable prey to the incompetent non-medical abortionist operating under septic conditions which endanger life and limb. Petitioner Janet Morin was one of the victims of misinformation. Rather than having the option of postponing pregnancy to a later date, she was forced to give birth, and faces tremendous psychological and financial burdens.

The 1964 rubella epidemic has subsided, but the legal issues it intensified have not been solved. Unless this

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[14] See ARK. STAT. ANN. § 41-301 (1964), *as amended,* [1969] ARK. LAWS, Act. 61; COLO. REV. STAT. ANN. § 40-2-50 (enacted as House Bill No. 1426, 1967); GA. CODE ANN. § 26-11 (1953), *as amended,* House Bill No. 281 (1968); MD. ANN. CODE art. 43, §§ 145, 149 (E)-(G) (Supp. 1967), *as amended,* House Bill No. 88 (1968); N. M. STAT. ANN. §§ 40A-5-1, -3 (1964), *as amended,* [1969] N. M. LAWS —— (Mar., 1969); N. C. GEN. STAT. § 14-45.1 (1967 Adv. Legis. Serv. No 3), MODEL PENAL CODE § 230.3(2), (3) (Proposed Official Draft, 1962).

[15] Cooper & Krugman, *Clinical Manifestations of Postnatal and Congenital Rubella,* 77 ARCH. OPTHALM. 434, 435 (1967), Appendix to Appellant's Brief, Appellate Division, p. 44a.

[16] Appendix to Appellant's Brief, Appellate Division, p. 60a.

Court hears this or a similar case the issues will remain to complicate the lives of thousands of similarly situated women when the 1970 epidemic reaches the United States.[17]

2. The impact of the decision below on the lives of petitioners and countless others similarly situated is compounded by the lack of guidance in decisions of this Court for resolution of questions involving abortion laws. Excepting *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), this Court has not recently heard a case involving any area of family planning or the personal autonomy of a woman with respect to her reproductive capacities. Yet birth control, abortion, and sterilization affect the lives of millions of American citizens each year in innumerable ways. Further guidance by this Court in a case such as the one presented here could have a tremendous impact on the solution of problems arising in the enforcement and administration of laws affecting this entire area.

3. The posture of the instant case, moreover, is the most frequent and clear cut example of a controversy involving abortion laws. There are none of the distractions of a criminal defense involving an unlicensed physician or even

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[17] According to the National Institute of Allergy and Infectious Diseases a full scale rubella epidemic is anticipated in the United States in the early nineteen seventies. N.Y. Times, Mar. 21, 1968, at 26, col. 1 (city ed.). Moreover, there is evidence that widespread use of the new rubella vaccine will in no way affect a pregnant woman, because the vaccine itself may infect the fetus. N.Y. Times, Feb. 21, 1969, at 24, col. 1.

It should also be noted that a decision on the constitutionality of an abortion statute under these facts could well apply to other, more frequently occurring situations. For example, there are over 25,000 forcible rapes yearly, yet only the statutes of six states permit abortion in cases of rape. U. S. BUREAU OF THE CENSUS, *Statistical Abstracts of the United States 1968* Table 207, at 143 (89th ed.).

a non-physician who performed an abortion which resulted in serious injury to the woman. *See, e.g., Moretti* v. *New Jersey*, 52 N. J. 182, 244 A. 2d 499, *cert. denied*, 393 U. S. 952 (1968). Nor are the difficult procedural questions of ripeness, standing, mootness, and abstention presented which might inhibit a declaratory judgment action by physicians, pregnant patients, or former patients. *See Poe* v. *Ullman*, 367 U. S. 497 (1961). Similarly, this is not a case which argues that a physician had a legal duty to perform an abortion, but only that defendants should have detected rubella and informed petitioner Janet Morin that serious congenital abnormalities were possible and that alternatives were open to her other than bearing this particular child. On the facts alleged this must be taken as defendant's duty, but the state courts interposed the New Jersey abortion statute and a state policy against abortion to override this duty.

4. The importance of this case to petitioners and others similarly situated across the United States should not be overlooked because the claims came up in a tort action that would normally turn on questions of state law. Petitioners have already pointed out that the judgments below could not be rested on adequate state grounds. In this sense the case is similar to *Levy* v. *Louisiana*, 391 U. S. 68 (1968), which this Court decided last term. *Levy* was also an action in tort against a physician who defended on unconstitutional state grounds. There the lower courts ruled that illegitimate children had no recourse for damages where a physician's negligence led to the death of their mother. In the instant case the New Jersey courts withdrew the normal malpractice remedy because petitioners Janet and Daniel Morin might have sought a therapeutic abortion in New Jersey or elsewhere if defendants had adequately diagnosed Janet Morin's condition as rubella and warned her of the possible consequences. In

both *Morin* and *Levy* there was a selective application by the state courts of their tort remedies. Both involve problems of enormous national significance. *Morin* deserves the same hearing in this Court which was given to *Levy*.

5. The New Jersey statute, as interpreted, is also the typical statute in the United States. Hence the case is one of national importance. *State* v. *Brandenburg*, 137 N. J. L. 124, 58 A. 2d 709 (1948), for example, squarely held that the only lawful justification for abortion was to preserve the mother's life. *Gleitman* v. *Cosgrove*, Appendix p. 8a, reaffirmed this restrictive and vague standard. It is the same statute now as that in over forty states. *See, e.g.*, George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. Res. L. Rev. 371, 376 n.31, in *Symposium—Abortion and the Law*, 17 W. Res. L. Rev. 369 (1965).

6. Finally, two additional factors support issuance of the writ in this case. First, there is no absence of extensive, mature legal commentary on the application and constitutionality of abortion statutes. As early as December, 1965, Professor Emerson of Yale suggested that reasonable interpretations of *Griswold* might open the way "for an attack upon significant aspects of the abortion laws." Emerson, *Nine Justices in Search of a Doctrine*, 64 Mich. L. Rev. 219, 232, in *Symposium on the Griswold Case and the Right of Privacy*, 64 Mich. L. Rev. 197 (1965). Innumerable articles and books have been forthcoming since that time, and these need not be catalogued here.

Second, public opinion on the constitutionality and desirability of present abortion laws has been manifested in several ways. As indicated before, the American Law Institute's Model Penal Code would authorize therapeutic abortion if the fetus might ultimately "be born with grave physical or mental defect." Model Penal Code §230.3(2)

(Proposed Official Draft, 1962). At least this bare minimum of liberalization and much more, has been supported by the American Medical Association,[18] the American College of Obstetricians and Gynecologists,[19] and over seventy percent of the physicians polled in a survey of some 40,000 American physicians.[20] More significant, however, is the fact that a large number of important national organizations favor virtually total repeal of any law which would criminally punish a physician and woman where a therapeutic abortion was performed. These groups include the Governing Council of the American Public Health Association,[21] Planned Parenthood—World Population,[22] the National Organization for Women, the Americans for Democratic Action, the American Civil Liberties Union, the New York State Council of Churches, and numerous other groups.

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With the importance of these considerations in mind, petitioners hereinafter outline the arguments on which this case is based.

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[18] N.Y. Times, June 22, 1967, at 41, col. 1 (late city ed.).

[19] *Id.*, May 11, 1968, at 5, col. 3.

[20] *Id.*, April 30, 1967, at 82, col. 6.

[21] Wall St. J., Nov. 15, 1968, at 4, col. 3.

[22] N.Y. Times, Nov. 14, 1968, at 50, col. 1 (late city ed.).

B. The decision below conflicts with applicable decisions by his Court.

To recapitulate, the present litigation has been decided on the authority of a substantially parallel case, *Gleitman* v. *Cosgrove.* A plurality in *Gleitman* passed over the dissent's (Chief Justice Weintraub) contention that the statute was unconstitutional. The plurality declined also to decide whether an abortion for German measles would be legal, but based its decision on "substantial policy reasons," 49 N. J. at 30, 227 A. 2d at 693, and "countervailing public policy" enunciated by that court. A concurring justice thought the abortion "would have been a crime . . ." 49 N. J. at 40, 227 A. 2d at 699. Petitioners therefore contend that both the statute and the public policy rule of the court below have been unconstitutionally applied to defeat a malpractice action based on conduct by defendants which was grossly out of step with accepted medical standards of behavior. A summary treatment of petitioners' more specific constitutional arguments follows:

1. The New Jersey statute and *Gleitman* policy operate to abridge petitioners' "right of marital privacy" recognized in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), and deprive petitioners of liberty without due process of law by broadly interferring with their fundamental personal rights on less than a showing of overriding and compelling state interest.

Whether based on the New Jersey statute or public policy, the decision below operates to deprive petitioners Daniel and Janet Morin, husband and wife, of the opportunity to choose to terminate a particular pregnancy in its early stages in order to have a child at a later date. Where a woman has been infected with German measles in the early stages of pregnancy it is important to her mental health, overall well-being, and the well-being of

her other children to be able to make this choice. The position of the New Jersey courts, however, has been that a physician has no duty to detect rubella, warn of its possible impact, or inform a woman of the possibility that she may obtain a therapeutic abortion.

At the trial court level petitioners argued that the reasoning of *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), applied to the kind of situation presented here, and that the New Jersey statute and public policy could not withstand the tests posed in *Griswold.* Certainly the right to control the planning of one's own family is a corollary of the broad right of marital privacy whether contraception or abortion after the failure of contraception is at issue.

As early as 1891 this Court stated that:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone.' *Union Pacific Ry.* v. *Botsford,* 141 U. S. 250, 251 (1891).

Similarly, the majority opinion in *Griswold* recognized that there was a right of marital privacy, protected by the

> familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' 381 U. S. at 485. (Opinion

> of Mr. Justice Douglas, joined by the Chief Justice, and Justices Brennan, Clark, and Goldberg).

To state the principle in a slightly different way, as was done by Mr. Justice Goldberg,

> [i]n a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' 381 U. S. at 497.

Petitioners certainly recognize that regulation of the medical profession is proper as a general principle, as is the protection of human life, but to extend these State interests bluntly into the early stages of pregnancy and to force a pregnant woman to bear a child each time she conceives is to go too far. In early pregnancy there is at most a potential person. The same is true with the living ova and spermatazoa prior to pregnancy. A State can protect human life quite adequately with its laws against infanticide and homicide.[23] To draw the line at conception is to assume that a fertilized egg is a human being, a proposition which it not even a half-truth.

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[23] See Gianella, *The Difficult Quest for a Truly Humane Abortion Law*, 13 Vill. L. Rev. 257, 275 (1968):

> "The experience with very liberal abortion laws in foreign countries, some of which have traditionally valued the individual and his liberties less dearly than we, does not reveal an erosion of respect for post-natal life because of widespread regularized abortion. It is a rather safe judgment that in our culture the line can be and probably would be held at abortion."

The decision below conflicts not only with *Griswold,* but also with other decisions of this Court involving various aspects of family life and family planning. *Loving* v. *Virginia,* 388 U. S. 1, 12 (1967), recognized a due process right to marry, "[t]he freedom to marry . . . as one of the vital rights essential to the orderly pursuit of happiness by free men." If a State can force married persons to bear and raise a child each time contraception fails or is not used, this right will be severely diluted. *Skinner* v. *Oklahoma,* 316 U. S. 535, 536 (1942), recognized "the right to have offspring" as a constitutionally protected "human right". Is not the right to regulate for oneself the number of offspring of similar stature?

Further decisions by this Court upholding rights associated with the family include *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), and *Meyer* v. *Nebraska,* 262 U. S. 390 (1923), both of which were subsequently reaffirmed in *Prince* v. *Massachusetts,* 321 U. S. 158, 166 (1944), and *Griswold* v. *Connecticut.* A unanimous Court in *Pierce,* including Justices Brandeis, Holmes, and Stone, recognized "the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U. S. at 534-35. Should not this liberty include the right to raise no more children than one can afford to bring up and educate? Similarly, *Meyer,* in an oft-quoted dictum, found that the due process clause included "the right . . . to marry, establish a home and bring up children." 262 U. S. at 399. And, *Prince* spoke of "the private realm of family life which the state cannot enter."[24] 321 U. S. at 166. By contrast, the New Jersey

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[24] *See also* the concurring opinion of Mr. Justice White in *Griswold* v. *Connecticut,* 381 U.S. 479, 502 (1965), which discussed and applied the principles of *Meyer, Pierce, Skinner,* and *Prince* to the controversy presented in *Griswold.*

courts below leave a family without relief where a physician's gross carelessness has seriously burdened them for life.

Taken together, the *Griswold, Loving, Skinner, Pierce, Meyer,* and *Prince* decisions all state principles which the New Jersey courts have ignored in the instant case. They have placed a statute and public policy as a barrier to relief which constitutes as serious an invasion of the "integrity of [family] life" [25] as any which was invalidated by prior decisions of this Court.

2. The statute and *Gleitman* policy deny petitioners the equal protection of the laws by selectively precluding a particular class of malpractice actions wherein the petitioners' rights are fundamental and the state's interest insubstantial.

In Part A, *supra,* petitioners argued that the rights they assert are fundamental personal rights as that term is used by this Court, and that the State interest in enforcing its anti-abortion statute and concomitant public policy are neither overriding nor compelling. This array of interests and their treatment by the New Jersey courts can also be characterized as a denial of equal protection. Clearly this Court would not permit a State to withhold access to its courts from persons because of skin! color, religious, or political viewpoint. The decisions below, however, have held that a physician's negligence is not malpractice where his patient may have sought out a therapeutic abortion because of the condition which the physician carelessly failed to diagnose.

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[25] Mr. Justice Harlen, dissenting, in *Poe* v. *Ullman,* 367 U.S. 497, 551 (1961).

A review of the history of malpractice suits in the New Jersey courts reveals that petitioners have been the victims of invidious discrimination as a consequence of the lower courts' treatment of their claim for relief. If petitioners Janet and Daniel Morin had been carelessly treated for bone fractures the New Jersey courts would have allowed them to prove that their physician was negligent and did not treat them according to the standards of specialists in that field. *Carbone* v. *Warburton,* 11 N. J. 418, 94 A. 2d 680 (1953) (William J. Brennan, Jr., J). Similarly, physicians who make a diagnosis by X-ray "must use due care to discover the nature of the disease which gives occasion for . . . services."[26] A physician must be certain to X-ray his patient properly.[27] He is liable if he burns a patient by carelessly administering a caustic solution internally instead of a soothing lotion.[28] He is liable if he uses an antibiotic which is so toxic that it causes permanent deafness.[29] Yet, a physician is not liable if he tells Mrs. Morin that her German measles, in an epidemic year, are not only not German measles but present no danger of abnormalities in the embryo.[30]

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[26] *Young* v. *Stevens,* 132 N.J.L. 124, 129, 39 A. 2d 115, 119 (1944).

[27] *Betenbaugh* v. *Princeton Hospital,* 50 N.J. 390, 235 A. 2d 889 (1967) (*per curiam*).

[28] *Becker* v. *Eisenstodt,* 60 N.J. Super. 240, 158 A. 2d 706 (App. Div. 1960).

[29] *Marchese* v. *Monaco,* 52 N.J. Super. 474, 145 A. 2d 809 (App. Div. 1958).

[30] Similarly, the courts below disallowed a cause of action for the Morin infant. If one views this claim as derivative of the parents' claim, a similar denial of equal protection is present. Petitioners do not, however, assert the infant's claim to this Court.

This Court has frequently announced principles governing invidious classifications made by state courts and legislatures. The decisions below violate these precepts in a serious way. As stated last term, in *Levy* v. *Louisiana*, 391 U. S. 68 (1968), the Court "has been extremely sensitive when it comes to basic civil rights and [has] not hesitated to strike down an invidious classification even though it had history and tradition on its side." (*Levy* is especially pertinent here because it was also a tort action which had been foreclosed by an unconstitutional state policy.) Similarly, this Court ruled in 1966 that

> where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully restrained. *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 670 (1966).

Harper is one of a long line of cases holding that care will be taken to avoid classifications which injure fundamental human rights. *See also Rinaldi* v. *Yeager*, 384 U. S. 305 (1966); *Baxtrom* v. *Herold*, 383 U. S. 107 (1966); *Carrington* v. *Rash*, 380 U. S. 89 (1965); *McLaughlin* v. *Florida*, 379 U. S. 184 (1964).

The decisions in *Levy* v. *Louisiana* and other equal protection cases, therefore, indicate that the policy applied below works an invidious discrimination against petitioners and could not withstand further review.

3. The statute and *Gleitman* policy impose a cruel and unusual punishment upon petitioners by subjecting them to severe penalties because of an illness over which they had no control.

A final defect in the decisions below is that they conflict with the principles announced by this Court in applying the cruel and unusual punishment clause of the Eighth Amendment.

First, there can be no doubt that petitioners Janet and Daniel Morin have been "punished" as that concept has been elucidated by this Court. "Punishment" need not be by fine or imprisonment. That term also encompasses expatriation,[31] disbarment,[32] and a variety of other disabilities which do not involve incarceration. Viewed from the perspective of the woman, the requirement that she wait out an unwanted pregnancy, week after week, not knowing whether the embryo is deformed or not, "is a form of punishment more primitive than torture . . ." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958). Similarly, the New Jersey courts below place the entire burden of expense and suffering upon the parents even though the physician might have diagnosed German measles as malaria or the common cold. The physician is given *carte blanche* to indulge in any degree of malpractice he chooses. He may deliberately conceal the facts of rubella from a patient, as was arguably the case here. He may actively mislead his patients. To require them to bear the entire burden under such circumstances is a "penalty" in every sense of the word. Indeed, such is the apparent intent of the courts below. The judicial

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[31] *See, e.g., Trop* v. *Dulles*, 356 U.S. 86 (1958).

[32] *See, e.g., In re Ruffalo*, 390 U.S. 544, 550 (1968) ("[d]isbarment, designed to protect the public, is a punishment or penalty. . . .").

policy enforces an extraordinarily narrow view of the state anti-abortion statute by indirection when it frees a physician from liability for actively misleading a patient infected with rubella.

Second, the decision below conflicts with the principles stated by this Court in *Powell* v. *Texas*, 392 U. S. 514 (1968), and *Robinson* v. *California*, 370 U. S. 660 (1962).[33] The punishment imposed on petitioner Janet Morin was the product of two factors. One was the malpractice and negligence of defendants, over which petitioners had no control. A second factor was the German measles infection, also "an illness which may be contracted innocently or involuntarily." *Robinson, supra*, 370 U. S. at 667. In the case of all other illnesses a patient in New Jersey is entitled to adequate and appropriate medical treatment. With respect to rubella, however, the treatment of therapeutic abortion may be a crime. As this Court stated in *Powell*, "[t]he entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing . . ." 392 U. S. at 533. Petitioner Janet Morin however, has been the passive victim throughout the history of this case. New Jersey has no interest in compelling her to bear a child when the fetus was infected with rubella. To do so and to withhold a tort remedy for defendants' malpractice violates the letter and spirit of the Eighth Amendment.

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[33] Petitioners have previously noted that a lower court in California found former CAL. PEN. CODE § 274 to be invalid under the Fourteenth and Eighth Amendments as applied to discipline physicians for performing therapeutic abortions on patients who had contracted German measles. *Shively* v. *Board of Medical Examiners*, No. 590333 (Cal. Super. Ct., San Fran Cty., Sept. 24, 1968).

CONCLUSION

For the reasons outlined above the petition for writ of certiorari should be granted.

Respectfully submitted,

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[APPENDIX FOLLOWS]

APPENDIX

Judgment of the Supreme Court of New Jersey

(Filed—December 10, 1968.)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 10th day of December, 1968.

A TRUE COPY

JOHN H. GILDEA
Clerk
Clerk of the Supreme Court

Opinion of the Superior Court of New Jersey, Appellate Division

A-656-67

Argued September 25, 1968—Decided October 4, 1968.

Before Judges CONFORD, KILKENNY and LEONARD.

On appeal from Superior Court, Law Division, Bergen County.

Mr. Jacob L. Balk argued the cause for appellants (*Messrs. Balk, Jacobs, Goldberger & Mandell,* attorneys).

Mr. John J. Francis, Jr. argued the cause for respondents Felix H. Vann and William C. Soule (*Messrs. Shanley & Fisher,* attorneys; *Mr. A. Dennis Terrell,* on the brief).

Mr. Robert J. C. McCoid argued the cause for respondent Victor S. Garra (*Messrs. Schneider & Morgan,* attorneys).

PER CURIAM

This appeal is controlled by the decision in *Gleitman* v. *Cosgrove,* 49 N. J. 22 (1967) on a substantially similar set of facts. The adding of a warranty count in the present case creates no material differentiation.

Judgment affirmed.

Order of the Superior Court of New Jersey, Law Division, Bergen County

DOCKET No. L-31878-65

This matter having been opened to the Court by Shanley & Fisher, Esqs., attorneys for defendants Drs. Felix H. Vann and William C. Soule, Robert A. Wayne, Esq. appearing, in the presence of Richard Arvidson, Esq. of Schneider & Morgan, Esqs., attorneys for defendant Dr. Victor S. Garra, and Jack Mandell, Esq. of Balk, Jacobs, Goldberger & Mandell, Esqs., attorneys for plaintiffs, and the Court having heard argument of counsel and having read the papers on file, and plaintiffs having consented to include defendant Dr. Victor S. Garra as a moving party, and good cause therefor appearing, it is on this 11th day of December, 1967,

ORDERED that the Summary Judgment Motion of the defendants Drs. Felix H. Vann, William C. Soule and Victor S. Garra be and is hereby granted and,

IT IS FURTHER ORDERED that judgment be entered in favor of the defendants Drs. Felix H. Vann, William C. Soule and Victor S. Garra against plaintiffs on all counts of the Complaint without costs.

PAUL R. HUOT,
J.S.C. t/a

We hereby consent to the form and entry of the within Order.

BALK, JACOBS, GOLDBERGER & MANDELL
By: JACK MANDELL

SCHNEIDER & MORGAN
By: RICHARD ARVIDSON

Oral Opinion of the Trial Court (November 17, 1967)

The Court: Well, gentlemen, I'm not working in the dark. I read your briefs in full and moving papers and pre-trial orders. I'm fully aware as to what the allegations are in your particular complaints and answers.

I will agree that this be disposed of by the Supreme Court, but I don't agree with the Court's opinion, at least the section on its comments on abortion being determinative of that case or of this case.

I think it's unfortunate, with all due respect to this Supreme Court, that that became part of the opinion, because I believe this case is much more adequately and narrowly determined on a question of proximate causation.

I don't think in that case, or in this case, that the plaintiffs are arguing that these doctors caused her to have German measles during the first three months of her pregnancy; and certainly the plaintiffs are not arguing that the doctors made her become pregnant. The defects in the child after it was born are directly connected to the German measles that she had during the first three months, and whether she could or could not legally have had an abortion has nothing to do with the cause and effect.

There are just some specific points raised by plaintiff's brief and referring as it does to Article 1, Section 1 of the New Jersey Constitution. All persons are by nature free and independent and have certain natural and inalienable rights. Among those are liberty, acquiring, possessing, and protecting property and of pursuing and obtaining safety and happiness.

I note that the plaintiff's brief talks about the inalienable right of the adult plaintiffs to happiness, whatever happiness may be, it varies with each individual; but

what the plaintiff is telling me in its brief and its argument is that since the adult plaintiff has a right to happiness, that adult plaintiff also has a right to destroy life to achieve happiness and if that is so, we're going to open a Pandora's box and the elimination of all laws with respect to homicide.

There's no law or statute, there's no constitution which is denying to Mr. and Mrs. Morin the right to have happiness. All the law is saying is what the Supreme Court said, and I agree with that opinion, and all that this Court will say is that the law merely says that the failure of a doctor to perform an abortion or to advise an abortion in cases where a female is pregnant and becomes afflicted with German measles during the first three months is not atrocious conduct which gives rise to a cause of action against the defendant in negligence or malpractice.

There's no way of knowing whether this plaintiff or the plaintiff in the other case might have consented to have such an operation, and it would seem to me without spending too much time in trying to work out logical premises and conclusions, and if we're going to logically state that the doctor must advise under the circumstances an operation of either a 50% to 80% chance or some 20% to 50% chance of producing a defective child, I would have to get around alternatively to the position where once the doctor advises, the patient is going to have to submit to the operation.

We're getting to the point where society is going to determine who should or should not be born, but as far as I know, we haven't changed the Constitution of the State of New Jersey or the Constitution of the United States with its knowledge that there is something over the State which determines life and death. It seems to me, the first step on the road to determine that, would be

for somebody to sit here in a black robe and decide who's going to live and who's going to die, regardless of what they may have done to society.

I don't think, I repeat, I don't think that the question of public policy on abortion has anything to do with this case. It's just a question of, "Did the doctor do anything which proximately resulted in the defective birth?" If he did, sure he's liable. If he used the instrument improperly, if he injected something improperly. Sure then, perhaps then his care and skill did not measure up to the standard of the medical society, a standard that he's bound to; but to say that his failure to tell you about the possibility or defect is what caused the defect, it goes beyond all sense of my logic. And if you tell me that the doctor is the cause of pregnancy or the doctor was the cause of the measles, then perhaps you've got something. If the doctor in his treatment or because of some negligence in cleaning up in his office spread the measle germ to the plaintiff, then you might have a case; but note also in the pre-trial order, by the way, there is no allegation that the plaintiff told the obstreticians that she had contacted the German measles during the first three months, and there are no allegations in the papers that Dr. Garra, who gave her the hemoglobin, was told she was pregnant at that time; and in that respect we're missing two allegations which are very pertinent to hold any one of these doctors responsible for injuries which resulted.

Plaintiff's brief was a master piece in argument for a change of public policy and certainly its logic is such that I can recommend, off the record, to send to every one of the legislature; it might have an effect. But, insofar as the law as it exists, you must admit it's a very good law.

I'm constrained to find in favor of all of the defendants, and I'll grant the motions of all and sign the appropriate order.

Excerpts from Petitioners' "Memorandum in Opposition of Motion for Judgment" Filed in Trial Court, pp. 32-33

* * * * *

In the majority holding in the *Gleitman* case, it is respectfully submitted that this determination of law should not and constitutionally may not bar the plaintiffs in the case *sub judica* from redress. Plaintiffs submit that the 9th Amendment of the United States Constitution is controlling. The 9th Amendment states:

> "The innumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The 9th Amendment was held applicable in a parallel situation in the case of *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), which is a United Supreme Court decision which held the Connecticut Birth Control Law unconstitutional. In that decision Justice Douglas cited the 4th and 5th Amendments "As protection against all governmental invasion of the sanctity of a man's home and the privacies of life," and the 4th Amendment as creating a "right of privacy, no less important than any other right carefully reserved to the people." . . . "The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."

In concurring opinions by Justice Goldberg and Chief Justice Warren and Justice Brennan, they stated:

> "The right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights.
>
> I believe that the right of privacy in a marital relation is fundamental and basic—a personal right 'retained by the people' within the meaning of the 9th Amendment."

* * * * *

Opinion of the Supreme Court of New Jersey in *Gleitman* v. *Cosgrove*, 49 N. J. 22, 227 A. 2d 689 (1967)*

JEFFREY ROBERT GLEITMAN, an infant by his guardian *ad litem*, IRWIN GLEITMAN and SANDRA GLEITMAN,

Plaintiffs-Appellants,

v.

ROBERT COSGROVE, JR., and JEROME DOLAN,

Defendants-Respondents.

No. A-35.

SUPREME COURT OF NEW JERSEY

Argued Nov. 21, 1966. Decided March 6, 1967.

The opinion of the court was delivered by PROCTOR, J.

This is a malpractice suit for money damages. The trial judge dismissed the complaint of the infant plaintiff at the close of plaintiffs' case, and dismissed the complaints of his father and mother after all the evidence was heard. The appeal was certified to this Court on its own motion pursuant to R.R. 1:10-1(a) prior to argument in the Appellate Division.

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* Petitioners in the instant case are not suing on behalf of the Morin infant. Accordingly, the *Gleitman* opinion is edited to exclude discussion of the Gleitman infant's claim.

The first count of the complaint is on behalf of Jeffrey Gleitman, an infant, for his birth defects. The second count is by his mother, Sandra Gleitman, for the effects on her emotional state caused by her son's condition. And the third count is by his father, Irwin Gleitman, for the costs incurred in caring for Jeffrey. Defendants, Robert Cosgrove, Jr. and Jerome Dolan, are physicians specializing in obstetrics and gynecology engaged together in the practice of medicine in Jersey City.

Sandra Gleitman consulted defendants on April 20, 1959. She was examined by Dr. Robert Cosgrove, Jr., and found by him to be two months pregnant. She informed him that on or about March 20, 1959 she had had an illness diagnosed as German measles. Mrs. Gleitman testified that Dr. Cosgrove, on receipt of this information and on inquiry by her, told her that the German measles would have no effect at all on her child.

For the next three months Mrs. Gleitman received her prenatal medical care from the army doctors at Fort Gordon, Georgia where her husband was stationed. She informed the army doctors about the German measles she had had in her early pregnancy, and they instructed her to ask her regular physician about this when she returned home.

She next consulted defendants in July at which time she saw Dr. Dolan. Mrs. Gleitman testified that she repeated her inquiry about the effects of German measles and again received a reassuring answer. These inquiries and answers occurred on each of her subsequent monthly visits.

On November 25, 1959 Mrs. Gleitman was delivered of a boy, Jeffrey, at the Margaret Hague Maternity Hospital in Jersey City. Although at first the baby seemed

normal, a few weeks later the substantial defects which Jeffrey has in sight, hearing, and speech began to become apparent. He has had several operations which have given him some visual capacity, and he attends a special correctional institute for blind and deaf children. His physical condition, which is seriously impaired, is not in dispute on this appeal.

Plaintiffs' medical expert, Dr. Louis Fraulo, gave his opinion that Jeffrey's condition was causally related to the viral disease of German measles which Mrs. Gleitman had in March. Dr. Fraulo testified that women who have German measles in the first trimester of their pregnancy will produce infants with birth defects in 20 to 50 per cent of the cases. Dr. Fraulo further stated that a physician who finds pregnancy and is given a history of German measles occurring during the term of pregnancy should inform his female patient of the likelihood of birth defects. In answer to a hypothetical question based on Mrs. Gleitman's testimony, Dr. Fraulo stated that defendants had deviated from generally accepted medical standards by not informing their pregnant patient of the likelihood of birth defects. A patient so informed, Dr. Fraulo testified, could then decide whether to bear the baby or have the pregnancy terminated by an abortion.

Dr. Robert Cosgrove, Jr. agreed that Mrs. Gleitman had consulted him for her pregnancy on April 20, 1959 and had thereafter been the patient of Dr. Dolan and himself until November 25, 1959 when Jeffrey was born. He further agreed that the history given him had included the illness of German measles in March, and acknowledged that his duty as a physician required him to inform his patient of the possibility of birth defects. He

testified, however, that in the presence of Dr. Samuel Cosgrove, since deceased, and a woman who appeared to be the mother of Mrs. Gleitman, he told his patient of a 20 per cent chance her baby would have some defect. He also stated that he informed her that some doctors would recommend and perform an abortion for this reason, but that he did not think it proper to destroy four healthy babies because the fifth one would have some defect.

Dr. Dolan testified that Mrs. Gleitman, whom he first saw in July when in any event it was too far along in the pregnancy for a medically safe abortion, had never asked him about the effects of German measles, and that he had never mentioned these effects to her. Dr. Dolan as well as Dr. Edward C. Waters, who was called as an expert for defendants, agreed that a physician had the duty of informing his patient as to the likelihood of birth defects which they both estimated would occur in some 20 to 25 per cent of the cases where a female has German measles in the first trimester of her pregnancy.

The theory of plaintiffs' suit is that defendants negligently failed to inform Mrs. Gleitman, their patient, of the effects which German measles might have upon the infant then in gestation. Had the mother been so informed, plaintiffs assert, she might have obtained other medical advice with a view to the obtaining of an abortion. Plaintiffs do not assert that Mrs. Gleitman's life or health was in jeopardy during the term of her pregnancy.

As noted above the trial judge dismissed the three counts without submitting any of them to the jury. The claim of the infant plaintiff was dismissed for failure to show that acts of the defendants were the proximate cause of Jeffrey's condition, and the claims by his moth-

er and father were dismissed because the trial judge believed the suggested abortion would be criminal in New Jersey under N.J.S. 2A:87-1, N.J.S.A.

Because the complaint was dismissed on motion for judgment by defendants, the testimony on behalf of plaintiffs together with all reasonable inferences therefrom will be assumed to be true. The motion for judgment of dismissal concedes for purposes of the motion the truth of plaintiffs' evidence. Melone v. Jersey Central Power & Light Co., 18 N. J. 163, 170, 113 A. 2d 13 (1955). Specifically, on this appeal we must take it to be the fact that Dr. Cosgrove, Jr. affirmatively misled Mrs. Gleitman on April 20, 1959 by telling her that the German measles she had in March would have no effect at all on her child then in gestation (despite the conflict in the evidence on this point).

For our discussion of this case we will assume that somehow or somewhere Mrs. Gleitman could have obtained an abortion that would not have subjected participants to criminal sanctions, and that she did not do so because she relied on the incorrect advice of the defendants.

At the outset it must be clearly understood that there is no suggestion by plaintiffs that defendants could have ordred any therapy—whether surgery, drugs or otherwise —which would have decreased the possibility that the infant then in gestation would be born with birth defects. The present case is sharply different from those cases where a deviation from standard medical practice affects the chances that an infant will be born with birth defects. In Sylvia v. Gobeille, R. I., 220 A. 2d 222 (Sup. Ct. 1966), plaintiff alleged that defendant physician should have given her mother gamma globulin when

the mother consulted him for German measles which she had while pregnant. It was alleged that this therapy would have decreased the likelihood that plaintiff would be born with physical defects. In the present case there is no allegation that gamma globulin or any other therapy might have helped.[1]

* * * * *

The mother and father stand in a somewhat different position from the infant. They are equally subject to the factual circumstance that no act by the defendants could have decreased the likelihood that the infant would be defective. However, Mrs. Gleitman can say that an abortion would have freed her of the emotional problems caused by the raising of a child with birth defects; and Mr. Gleitman can assert that it would have been less expensive for him to abort rather than raise the child.

A considerable problem is raised by the claim of injury to the parents. In order to determine their compensatory damages a court would have to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries. Such a proposed weighing is similar to that which we have found impossible to perform for the infant plaintiff. When the parents say their child should not have been born, they make it impossible for a court to measure their damages in being the mother and father of a defective child.

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[1] The only evidence in the case concerning gamma globulin was given by Drs. Cosgrove and Dolan and tended to show that gamma globulin is sometimes used as therapy at the time a pregnant woman is actually ill with German measles but not afterwards.

Denial of the claim for damages by adult plaintiffs is also required by a close look at exactly what it is they are here seeking. The thrust of their complaint is that they were denied the opportunity to terminate the life of their child while he was an embryo. Even under our assumption that an abortion could have been obtained without making its participants liable to criminal sanctions substantial policy reasons prevent this Court from allowing tort damages for the denial of the opportunity to take an embryonic life.

It is basic to the human condition to seek life and to hold on to it however heavily burdened. If Jeffrey could have been asked as to whether his life should be snuffed out before his full term of gestation could run its course, our felt intuition of human nature tells us he would almost surely choose life with defects as against no life at all. "For the living there is hope, but for the dead there is none." Theocritus. See Ryan (M.D.), "Humane Abortion Laws and the Health Needs of Society," 17 West. Res. L. Rev. 424, 428-430 (1965); and for a recent statement on "the rights of the fetus" see Conniff, "The World of the Unborn," The New York Times, January 8, 1967, §6 (Magazine), pp. 97-98.

The right to life is inalienable in our society. A court cannot say what defects should prevent an embryo from being allowed life such that denial of the opportunity to terminate the existence of a defective child in embryo can support a cause for action. Examples of famous persons who have had great achievement despite physical defects come readily to mind, and many of us can think of examples close to home. A child need not be perfect to have a worthwhile life.

We are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity

of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle. It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of the single human life to support a remedy in tort. Cf. Jonathan Swift, "A Modest Proposal" in Gulliver's Travels and Other Writings, 488-496 (Modern Library ed. 1958).

Though we sympathize with the unfortunate situation in which these parents find themselves, we firmly believe the right of their child to live is greater than and precludes their right not to endure emotional and financial injury. We hold therefore that the second and third counts of the complaint are not actionable because the conduct complained of, even if true, does not give rise to damages cognizable at law; and even if such alleged damages were cognizable, a claim for them would be precluded by the countervailing public policy supporting the preciousness of human life.

In the view we have taken of the case we need not consider whether the abortion which plaintiffs were denied the opportunity to obtain would have been illegal. Our statute provides criminal sanctions for abortions which are performed "without lawful justification." N.J.S. 2A: 87-1, N.J.S.A. and see N.J.S. 2A:170-76, N.J.S.A. The only justification so far held lawful by our courts is preservation of the mother's life. State v. Shapiro, 89 N. J. L. 319, 98 A. 437 (E. & A. 1916); State v. Brandenburg, 137 N. J. L. 124, 58 A. 2d 709 (Sup. Ct. 1948). It may well be that when a physician performs an abortion because of a good faith determination in accordance with accepted medical standards that an abortion is medical-

ly indicated, the physician has acted with lawful justification within the meaning of our statute and has not committed a crime. See §207.11 Model Penal Code, comment 4, 153-154 (Tent. Draft No. 9, 1959), and cf. Sanitary Vendors, Inc. v. Byrne, 40 N. J. 157, 190 A. 2d 876, 96 A. L. R. 2d 948 (1963).

For the foregoing reasons the judgment of the trial court dismissing the three counts of the complaint is affirmed.

For affirmance: Justices FRANCIS, PROCTOR, HALL and HANEMAN—4.

For reversal in part: Chief Justice WEINTRAUB—1.

For reversal: Justices JACOBS and SCHETTINO—.

FRANCIS, J. (concurring).

I concur in the opinion of Justice Proctor, except that I prefer to deal more specifically with the problem of criminality of a eugenic abortion of the type involved in this case.

It may be noted that the dismissal of the suit as to the adult plaintiffs in the trial court did not take place at the close of the plaintiffs' proof. The factual defense was presented, and thereafter defendants' motion to dismiss was granted. Thus on one side of the controversy we have Mrs. Gleitman's assertion (1) that she told Dr. Cosgrove of her experience with German measles (rubella) when she first consulted him about her pregnancy, (2) that she inquired of Dr. Cosgrove on that occasion and thereafter whether her child would be defective as a result of the disease, and (3) that he and later Dr. Dolan assured her there was nothing to be concerned about, the child would not be affected. On the other side, we have Dr. Cos-

grove's testimony that when Mrs. Gleitman informed him of the rubella, he advised her that the incidence of damage to babies of mothers who had the disease in the early stages of their pregnancy was about 20%. He said also that he told her there were places where abortions were performed for that reason, but that he did not consider it proper to handle obstetrics cases in that way; he did not think that in order to eliminate one baby who might be deformed, the destruction of four more babies who might be perfectly normal was "a very reasonable way to conduct the practice of medicine." Not only did he make it plain that he would not do such an abortion, but he also testified that in his view the operation would be criminal in New Jersey and in every other state as well.

On this appeal, as Justice Proctor pointed out, the issue of credibility between Mrs. Gleitman and the doctors is not before us. The defense version of the affair is mentioned primarily because of its bearing on another aspect of the case to be discussed hereafter. The narrow question presented to this Court for decision is: assuming the truth of Mrs. Gleitman's testimony, does the law recognize a cause of action against a doctor who fails to tell a pregnant wife who has had rubella in the first trimester of her pregnancy that her child may be defective and who fails to tell her she may elect to have an abortion performed by him under proper auspices or, if he will not do so, by another physician who is not opposed to the operation, or in some other state or country where such operations are sanctioned. If there is such a legally cognizable claim against the doctor, then the trial court's judgment must be reversed and the case remanded for trial by a jury which will resolve the matter of credibility between the disputants.

I

Under the existing statute, N.J.S. 2A:87-1, N.J.S.A., it is a crime to commit an abortion "without lawful justification." Plaintiff Mrs. Gleitman contends that contraction of German measles during the first trimester of her pregnancy constituted lawful justification for the destruction of her child in this State by a New Jersey doctor. She claims further that even if this type abortion is criminal in this State, it was malpractice for Doctors Cosgrove and Dolan not to advise her that as a result of the rubella her child might be defective and that in such cases it is or may be possible in some states or countries to obtain an abortion. Resolution of these problems requires a study of the background of our abortion law.

The *statutory* crime of abortion had its origin in 1849. See L. 1849, p. 266, which became effective on March 1, 1849. The act said:

> "That if any person or persons, maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine, or noxious thing; and if any person or persons maliciously, and without lawful justification, shall use any instrument, or means whatever, with the like intent * * * shall, on conviction thereof, be adjudged guilty of a high misdemeanor; and if the woman die in consequence thereof, shall be punishable by fine, not exceeding one thousand dollars, or imprisonment at hard labour for any term not exceeding fifteen years, or both; and if the woman doth not die in consequence thereof, such offender shall, on conviction thereof,

> be adjudged guilty of a misdemeanor, and be punished by fine, not exceeding five hundred dollars, or imprisonment at hard labour, for any term not exceeding seven years, or both."

The impetus for the legislative action is interesting and significant. Abortion was a crime at common law, but guilt was subject to certain exceptions. During 1848 or early 1849 one Cooper was indicted for abortion. The Supreme Court quashed the indictment because under the common law the crime was not present unless the child was quick within the mother's womb when the abortion was committed. The court said the offense was against the lif of the child, and in contemplation of law life commenced "at the moment of quickening, at that moment when the embryo gives the first physical proof of life."[1] Since there was no quickening, there was no life to be destroyed and consequently the defendant could not be convicted. The Chief Justice, who wrote the opinion, suggested that if the good of society required elimination of the evil of prequickening abortion he supposed it was "far better that it should be done by legislative enactments" rather than by judicial extension of the common law penal code. And he said the court deemed it "unwise upon this subject to occupy debatable ground." State v. Cooper, 22 N. J. L. 52 (Sup. Ct. 1849).[2]

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[1] 14-20 weeks. See Annotation, §207.11, Tentative Draft, Model Penal Code (1959) 148.

[2] The unwillingness of the New Jersey court to change the common law abortion rule also reflected the attitude of other jurisdictions. For example, in *Mitchell* v. *Commonwealth*, 78 Ky. 204, 39 Am. Rep. 227 (Ct. App. 1879), where the issue was the same as in *Cooper*, the Supreme Court said:

(*Footnote continued on following page*)

The response of the Legislature, once it foresaw the result in *Cooper,* was galvanic. The statute quoted above was enacted even before the court announced its decision. The requirement for quickening of the fetus as an indispensable element of the crime was eliminated. Causing "the miscarriage of a woman then pregnant with child * * * without lawful justification" was established as the criminal offense. In 1872 a change was made in the act. The original statute declared that if the woman died as the consequence of the abortion, one penalty would follow; if she did not die, a lesser penalty was specified. The 1872 supplement provided for a certain penalty if the woman *or child* died; and a lesser one if neither died. Since that time there has been no change of substance in the description of the offense. The 1952 revision of the Crimes Act, which put the statute in its present more concise form, eleminated only a redundancy in the description of the crime. Whereas the earlier laws spoke of causing or procuring the miscarriage of "a woman then pregnant with child," the revision put the crime in terms of causing or procuring "the miscarriage of a pregnant woman." N.J.S.

(*Footnote continued from preceding page*)

"In the interest of good morals and for the preservation of society, the law should punish abortions and miscarriages, willfully produced, at any time during the period of gestation. That the child should be considered in existence from the moment of conception for the protection of its rights of property, and yet not in existence until four or five months after the inception of its being, to the extent that it is a crime to destroy it, presents an anomaly in the law that ought to be provided against by the law-making department of the government. The *limit of our duty is to determine what the law is, and not to enact or declare it as it should be.*" (Emphasis added)

2A:87-1, N.J.S.A. However, the revision continued in force the provision for more severe punishment if the "woman or child shall die" as a consequence of the abortion.

The 1849 act and the subsequent legislative treatment reveal an unquestionable intention to enlarge the scope of the common law crime of abortion. An equally obvious purpose was to enlarge the protection offered by the common law so as to include the embryo or fetus *en ventre sa mere*. The reference to "pregnant with child" and to the more severe penalties if the mother or child died from an abortion have deep significance. Obviously the pregnancy contemplated by the Legislature was the condition which begins at the moment of conception and terminates with delivery of the child. State v. Loomis, 90 N. J. L. 216, 100 A. 160 (E. & A. 1916). The lawmakers were saying as a matter of public policy that the moment the womb becomes instinct with embryonic life, it should be unlawful to interrupt the ordinary development of that life "without lawful justification" (of which more later). In my judgment, the most important consequence of the statute is the legislative recognition and sequential incorporation in the law of the principle that the child as a legal entity begins at conception; as of that time it has a legal existence as a separate entity, as distinguished from a mere part of its mother's body. Distinctions based upon physical status during gestation such as embryo, fetus and viability lost their earlier impact on the crime of abortion. It was not until relatively recent years that the judiciary became aware of the full portent of the legislation.

The former Supreme Court in *Cooper* commented that for many purposes in the law of property and inheritance, the child *in utero* had been considered in being. But the Court felt itself bound by the common law precedent requiring the fetus to be quick before it could be considered legally in being for administration of the criminal law of

abortion. The immediate response of the Legislature in 1849 to the circumstances of *Cooper* makes plain its design that the law should accept the child as in being from the instant of conception. Seven years ago our Court by unanimous vote gave full recognition to the principle that the unborn child at all stages of its gestive life is a legally existing entity. Smith v. Brennan, 31 N. J. 353, 157 A. 2d 497 (1960).[3]

Rather extensive research satisfies me that at common law the only defense to an indictment for abortion was that destruction of the fetus was reasonably believed by the operating physician to be necessary to preserve the mother's life.[4] Although there is no New Jersey case ex-

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[3] Justice Proctor's opinion for the Court pointed out that medical authorities, which he cited, recognize that before birth an infant is a distinct entity; that the criminal law regards him as such, as well as does the law of property and decedents' estates for purposes beneficial to his interests. 31 N. J., at pp. 363-367, 157 A. 2d 497. It was noted 30 years ago that the increase in knowledge of embryology had revealed that the child has separate existence from the moment of conception. See Note, "A Functional Study of Existing Abortion Laws." 35 Colum. L. Rev. 87, fn. 2, p. 88 (1935).

[4] See, Clark & Marshall on Crimes (6th ed. 1958) § 11.06 pp. 685-689; Perkins, Criminal Law (1957) 101, 106; 3 Burdick, Law of Crimes (1946) § 871, p. 287; Miller, Criminal Law (1934) 443-444; Clark's Criminal Law (3d ed. 1915) 430-431; Annotation, Tentative Draft, Model Penal Code, supra, p. 152; Note, "A Functional Study of Existing Abortion Laws," 35 Colum. L. Rev., supra, at p. 95, fn. 53; see the much cited case of *Rex* v. *Bourne* [1938] 3 All E.R. 615 (K.B.) where the trial court charging the jury said that if the doctor did not perform the abortion "in good faith for the purpose only of preserving the life of the girl," the verdict should be guilty. He said also that the words "in good faith for the purpose only of preserving the life of" the woman "express what, in my view, has always been the law with regard to the procuring of an abortion, and, although not expressed in sect. 58 of the Act of 1861, they are implied by the word "unlawful" in that section."

pressly stating this rule, Chief Justice Case speaking for the former Supreme Court in State v. Brandenburg, 137 N. J. L. 124, 126-127, 58 A. 2d 709, 710 (1948), in sustaining an abortion conviction rejected the contention that the following jury charge was erroneous:

> "Lawful justification is used in the sense of necessity. It is a defense that the destruction of the child's life was necessary to save that of the mother, but it should be remembered that necessity of this class must be strictly limited. The right can only be exercised in extremity."

The Court found it "unnecessary to consider whether under our statute and the construction thereof given, by our courts threatened impairment of a woman's health, as distinguished from the saving of her life, constitutes lawful justification."

Weighty corroboration for the view that the only defense at common law to the charge of causing an abortion was that it was done to save the life of the mother is to be found historically in the action taken by legislatures throughout the country. Since the early 1800's 46 states have adopted statutes making abortions criminal unless performed to have the mother's life. Seven states added, as another justification, aborting to save the life of the child. A few states and the District of Columbia sanction as a defense that the abortion was necessary to preserve the health of the mother or to prevent serious and permanent bodily injury. Four states, including New Jersey, provide no specific exception to the general prohibition against abortion. Annotation, Tentative Draft, Model Penal Code, supra, at pp. 152-153; George, "Current Abortion Laws: Proposals and Movements for Reform," 17 W. Res. L. Rev. 371, 375-376 (1965). These four speak in

terms of "unlawful" abortion, "unlawfully" performing acts intended to cause abortion, and in New Jersey, as set forth earlier, the prohibition is against committing the abortion "without lawful justification."

In an area of criminal law such as an abortion statute, which is so intimately related to public policy, ethics and morals, the nature of the offense prohibited depends strictly upon the language employed by the Legislature. And the intention conveyed and intended to be conveyed by the language must be determined in the ambiance of the time of its use, here 1849. At that time the only defense acceptable to the common law was that the abortion was performed to save the life of the mother. To me, therefore, it is inescapable that when the Legislature incorporated the words "without lawful justification" in its description of the crime, the justification intended was the only one then recognized, *i.e.*, to save the life of the mother. See Perkins, Criminal Law, supra, pp. 106-107. Moreover, the exception in its precise terms remained unchanged through the 1872 supplement and the 1898 and 1952 revisions of the Crimes Act. Also, it should be recalled that in State v. Brandenburg, supra, which was decided in 1948, the Supreme Court declined to hold or to give any indication that an abortion performed not to save the life of the mother, but for some reason pertaining to her health, would be within the statutory excuse. And, although not of overwelming import, it is of some significance, that after *Brandenburg* the Legislature did not in the ensuing years, particularly in the 1952 revision, enlarge the long-standing meaning of "without lawful justification."

It is a cardinal principle of statutory construction that the enactment under consideration must be viewed and interpreted in the light of the contemporary scene at the

time the Legislature acted. No one, even the most sincere advocate of enlargement of the perimeter of justifiable cause for abortion, would suggest that the 1849, 1872 or 1952 Legislatures had in mind sanctioning eugenic abortions. The tenet referred to finds generally accepted expression in 50 Am. Jur. Statutes, §236 (1944, Supp. 1966) to the effect that there is a tendency to construe the language of a statute in the light in which it may appear to a particular judge when his construction is to be given. But

> "* * * such an approach to the question is erroneous. Since, in determining the terms of a statute, the aim is to discover the connotation which the legislature attached to the words, phrases, and clauses employed, the words of a statute must be taken in the sense in which they were understood at the time the statute was enacted, and the statute must be construed as it was intended to be understood when it was passed."

This statement accords with the long-standing sentiment of the New Jersey courts. For example, the former Court of Errors and Appeals in Crater v. County of Somerset, 123 N. J. L. 407, 413, 8 A. 2d 691, 696 (1939), said:

> "It suffices to add that we are under a duty to refer to the history of the times 'to ascertain the reason for, and the meaning of the provisions of a statute, and to the general state of opinion, public, judicial and legislative, at the time of enactment. And the unmistakable evidence of such contemporaneous circumstances of the intention of the legislature should govern the construction of a statute whose terms are left doubtful by its language, and whose object is the correction of an abuse.'"

See also Magierowski v. Buckley, 39 N. J. Super. 534, 553-554, 121 A. 2d 749 (App. Div. 1956); and especially Carlo v. Okonite-Callender Cable Co., 3 N. J. 253, 265, 69 A. 2d 734, 740 (1949), where this Court said:

> "It is well established * * * that statutes are to be construed with reference to the common law and that a statute which is claimed to impose a duty or establish a right [or a justification] which was not recognized by the common law will be strictly interpreted to avoid such asserted change. To effectuate any change in the common law the legislative intent to do so must be clearly and plainly expressed." (Bracketed words added)

The sum of all the above is that in my judgment the "without justification" exception applies only when the death of the mother can be reasonably anticipated to result from natural causes unless the child is destroyed. Additionally it means that I do not believe judges have a roving commission to pour into an exception in a penal statute volatile content which is plainly at odds with the original legislative intention, because of personal beliefs that eugnic considerations ought to provide justifiable cause for abortion. Our duty in this highly charged public policy area is to say what the law is and not what we think it ought to be. What it ought to be is a matter for the legislative branch of the government, and we must assume that branch will be conscientiously responsive to the requirements of public health and welfare, and the social and economic exigencies of the times. If it is not as responsive as the people believe contemporary life demands, the remedy rests with them and not with the courts.

No one claims an abortion was necessary to save Mrs. Gleitman's life. In fact the uncontradicted testimony is

to the contrary. Thus, destruction of the fetus because of the previous rubella would have been a crime, as Dr. Cosgrove conceived it to be. Furthermore, it would have been a crime in all of our sister states where preservation of the life of the mother is the only warrant for an induced miscarriage. And even if Dr. Cosgrove, believing in good faith that such an interruption of pregnancy was lawful, had performed the operation or arranged for some other New Jersey doctor to do so, he would have been guilty of the criminal offense. Cf. Adams v. State, 200 Md. 133, 88 A. 2d 556 (Ct. App. 1952); State v. Ellrich, 10 N. J. 146, 89 A. 2d 685 (1952).

II

In seeking some support for the argument that the 1849 Legislature intended "lawful justification" for an abortion to include preservation of the health of the mother as well as her life, reference is made to State v. Murphy, 27 N. J. L. 112, 114-115, where in 1858, nine years after adoption of the statute, the Supreme Court said:

> "* * * The design of the statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts."

If the court meant to suggest that the only purpose of the 1849 act was to protect the life and health of the mother, I disagree. There is nothing in the legislative language to support that idea. It seems to me there were two objectives, of at least equal importance. One was to provide greater protection for the child *in utero* than was given under the common law. To accomplish this, the safeguard against abortion was moved backward from the

time when the child became quick, to the moment of conception. Important *sequelae* have flowed directly or indirectly from this change, the most recent of which may be found in the Smith v. Brennan view of this Court that the unborn child exists as a legal entity from the moment of conception. The second objective was to furnish additional protection for the life and health of the mother by establishing the criminal liability for the abortionist as of the beginning of the pregnancy. This broader view of the aim of the 1849 law seems to have been the opinion of this Court in State v. Siciliano, 21 N. J. 249, 258, 121 A. 2d 490 (1956), and In re Vince, 2 N. J. 443, 67 A. 2d 141 (1949).

Whatever the merit of the statement in State v. Murphy, it supplies no basis for plaintiffs' claim that "lawful justification" for an abortion was intended by the 1849 act to include preservation of the health of the mother as well as to save her life. It is perfectly clear that the *Murphy* court in referring to the purpose of the statute, in making abortion a crime if committed at any time during the period of gestation, as being to protect the life and health of the mother, was talking about safeguarding the mother *from the possible dangerous consequences of an abortion.* It was not intimating a view that the statute was intended to protect her *from the consequences of her pregnancy* beyond the safeguard provided by the common law, *i.e.,* if her left came into danger from the pregnancy she could be aborted without criminal liability for the abortionist. There is no inconsistency between these ideas or purposes. The statute recognized the dangers to life and health associated with abortion attempts, and in the publice interest made such attempts, successful or otherwise, criminal. But, it accepted also the sensible common law

attitude that occasionally, when a condition arising out of the pregnancy puts the mother's life in danger, the individual interest in safeguarding life must be regarded as paramount and the public policy against abortion subordinate. In this event the bar against abortion vanishes.

At times the line of demarcation between danger to life and danger to health from the pregnancy may be a shadowy one. In such case the honest expertise of the medical profession must be relied upon, and where the credibility of the operating physician is in issue, the decision as to whether he reasonably believed the woman's life was in danger ordinarily will be left to the jury. In this connection the Iowa Supreme Court said, "[I]t [is] not essential that the peril to life should be imminent. It [is] enough that it be potentially present, even though its full development might be delayed to a greater or less extent. Nor [is] it essential that the doctor should believe that the death of the patient would be otherwise certain in order to justify him in affording present relief." State v. Dunklebarger, 206 Iowa 971, 221 N. W. 592, 596 (1928). Compare Rex v. Bourne, supra, which should not be regarded as a very worthwhile precedent. Both court and physician subverted the phrase "solely for the protection of the life of the woman" to serve the sympathetic expediency of the case. Quay, "Justifiable Abortion—Medical and Legal Foundations," 49 Geo. L. J. 395 (1961); and cf. State v. Gunther, 169 S. W. 2d 404 (Mo. Sup. Ct. 1943); State v. Rudman, 126 Me. 177, 136 A. 817 (Sup. Jud. Ct. 1927); Hatchard v. State, 79 Wis. 357, 48 N. W. 380 (Sup. Ct. 1891); Commonwealth v. Wheeler, 315 Mass. 394, 53 N. E. 2d 4 (Sup. Jud. Ct. 1944).

Suppose we assume for purposes of the present case that "lawful justification" for destroying the child includes

danger to the mother's health from the pregnancy—is plaintiffs' alleged cause of action in any better position? The uncontradicted medical proof is that Mrs. Gleitman enjoyed good health through the full period of her pregnancy and the delivery of the child. Doctors Cosgrove and Dolan testified that she had a normal and uneventful period of gestation and delivery. Neither she nor any doctor testified to the existence of any adverse health condition which would justify the therapy of an abortion. Consequently, even if serious danger to the mother's health from the pregnancy itself or from the effect of the pregnancy prior to a full term delivery or some other physical or mental disability were to be regarded as within the statutory justification, the thesis would not be applicable here. And no case so holding has been furnished to us from any one of the few of our sister states whose statutes accept serious health problems of the mother as a basis for abortion. Even in Massachusetts, where judicial construction has excluded from the "unlawful" category an abortion necessary to save a woman "from great peril to her life or health" (Commonwealth v. Brunelle, 341 Mass. 675, 171 N. E. 2d 850 (1961), no decision indicates that the circumstances present here would justify the operation.[5]

During the trial and on this appeal plaintiffs refer to the operation, which they say Mrs. Gleitman was entitled

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[5] The section of the proposed Model Penal Code abortion statute which seeks to establish certain considerations of health as an excuse for abortion, if adopted, would not assist plaintiffs here. It seeks to justify abortion if continuance of the pregnancy would, in the opinion of the physicians, entail "a substantial risk of gravely impairing the mother's physical or mental health." Proposed Official Draft, Model Penal Code, section 230.3, subsection (2) (1962). No such risk is supportable under the testimony in this case.

to have, as a "therapeutic" abortion. Obviously that is a misnomer. A therapeutic abortion is an induced interruption of a pregnancy, the continuance of which will jeopardize the life or health of the mother. Schmidt's Attorney's Dictionary of Medicine (Matthew Bender & Co., Inc., 1965) 1966 Supplement p. 159; Maloy, Medical Dictionary for Lawyers (2d ed. 1951, Callaghan & Co.) p. 5; Application of Grand Jury of County of Kings, 286 App. Div. 270, 143 N. Y. S. 2d 501 (App. Div. 1955).

A termination of a pregnancy of the type involved in this case is described properly in the Chief Justice's dissent as a eugenic abortion. Eugenics is the science which addresses itself to improving the stock, whether human or animal; to means and methods of improving the physical and mental qualities of future generations by control of mating and reproduction. Schmidt's, supra, p. 284. In the context of a case like the present one, a eugenic abortion would be one based on the probability or possibility that the fetus may be born in a mentally or physically abnormal condition. No American statute authorizes such an abortion. George, Current Abortion Laws: Proposals and Movements for Reform, supra, p. 394. Thus it is criminal not only in New Jersey but in all of our sister states as well. Certain it is that no judicial decision has been found in this country which accepted a eugenic abortion for rubella as a defense to a criminal indictment.

In addition to the reasons already expressed for my belief that a eugenic abortion in cases of rubella is not founded in justifiable cause within the contemplation of our statute, some further explanation of the basis for my conviction that resolution of the issue should be left to the Legislature seems called for.

The effect of rubella contracted in the first trimester of a woman's pregnancy as the cause of mental or physical abnormality in the child is spoken of as if it were horrendous in degree and virtually certain in all cases. But this is not so. According to varying statements in the record, the incidence of defective children ranges from 10% to 50%, in early pregnancy rubella cases. Referring to a 1963 article entitled "Infectious Diseases During Pregnancy" which was produced while he was on the witness stand, Dr. Cosgrove said he agreed with the statement therein that most authorities "report anomalies in only ten to twenty per cent of infants whose mothers are infected during the first trimester." It seems to be undisputed generally in the medical profession that presently there is no way of telling in advance of delivery whether such a child will be defective or the extent of any defect. In any given case there appears to be no certainty, only a variable statistic. Also, in "Humane Abortion Laws and the Health Needs of Society" by Dr. Kenneth J. Ryan, Professor of Obstetrics and Gynecology at the School of Medicine of Western Reserve University, 17 W. Res. L. Rev. 424, 428-429 (1965), it is noted that "In a careful prospective study which followed the 227 infants of mothers who contracted rubella during pregnancy, the incidence of mental retardation was no different than in the general population; ninety-two per cent of the children were attending regular schools eight to eleven years after birth. Many of the defects of these children were correctible." But in the proponents of eugenic abortions in first trimester rubella cases advocate destruction of every fetus to serve the variable statistics.

Moreover, congenital defects from rubella run a broad spectrum. It is certain the children are not all as dis-

abled as the unfortunate Gleitman boy. For example, blindness may be partial or total; it may be unilateral or bilateral. In many cases the degree of impairment may be different between the two eyes, and in some, one eye may be perfectly normal while the other is impaired. See, Roy & Deutsch, "The Congenital Rubella Syndrome—Ocular Pathogenesis and Related Embryology," 62 Am. J. Ophthal. 236, 238 (1966). The same inbalance may occur in hearing impairment. "Rubella Virus and the Human Foetus," 1965 Brit. Med. J. 1014, 1015; see also, Sheridan, "Final Report of a Prospective Study of Children Whose Mothers had Rubella in Early Pregnancy," 1964 Brit. Med. J. 536, 537-538. It might well be noted here also that in Dr. Ryan's article, supra, at page 429, he points out that "In this country's rubela epidemic of 1964-1965, many women were aborted with and without good evidence of risk, since other viral infections often masquerade as clinical rubella." Yet the eugenic abortion advocates would destroy every fetus when associated with an early pregnancy rubella. But the proposed Model Penal Code suggests only that an abortion be authorized when there is substantial risk that "continuance of the pregnancy" would mean that "the child would be born with *grave* physical or *mental* defect." Section 230.3 (2). (Emphasis added.)

There are doctors who feel that abortion in rubella cases represents a negative approach. They held the view that their profession is devoted to the preservation of life, not to its destruction; that the major efforts in this field should be based on research and pointed toward prevention, not destruction. In the article in The New York Times, Conniff, "The World of the Unborn," referred to by Justice Proctor, it is said that "one line of research—

already far advanced toward success—seeks a vaccine for the mother against German measles (or rubella)," p. 96.

There are many conditions and diseases of the mother which result in defective children. At one time tuberculosis was called "the most significant indication for therapeutic abortion in point of frequency" but abortion for that reason is practically nonexistent today. See, Dr. Kenneth R. Niswander, Associate Professor of Obstetrics and Gynecology at the State University of New York, "Medical Abortion Practices in the United States," 17 W. Res. L. Rev. 403, 416 (1965). The doctor noted "of the abortions in a recent Buffalo study, tuberculosis accounted for 33 to 50 per cent of the abortions in the 1940's, about 10 per cent in the 1950's, and none during the years 1958 to 1965." The advent of drug therapy produced this change. Id., at p. 409. Cardiovascular disease in pregnant women was treated frequently in the past as a proper basis for therapeutic abortion. But "with improved prenatal care (including the significant advances recently provided by cardiac surgery), the number of women with cardiovascular disease whose life is actually in danger during pregnancy has decreased substantially." Dr. Niswander, supra, at page 407. In the Buffalo study referred to above, "cardiovascular indications were present in about 15 per cent of the pregnancy interruptions in the 1940's; the incidence had decreased to approximately 5 per cent in the 1950's and became practically non-existent in the 1960's." Id., at page 416. I have no doubt that other instances of this kind can be found. According to Dr. Niswander, "Taussig, in his volume published in 1936, lists a myriad of medical indications for abortion. Since the publication of [his] book, there has been a gradual transition in medical thinking, and some

of the diseases formerly used as indications for abortion no longer obtain." Id., at page 416, citing Taussig, Abortion, Spontaneous and Induced: Medical and Social Aspects (1936). See also the references in The World of the Unborn, supra, pp. 96-100, to the success of fetologists in treating the fetus *in utero* and guarding against some birth defects thereby. As the author hopefully puts it:

> "People at work on the frontiers of obstetrics foresee, by all these means, not just an end to birth defects, but actual enhancement of intelligence and improvement of the bodily organs by 'genetic engineering.'" Id., at page 100.

In referring to some of the medical aspects of the problem here, I do not pretend to any professional knowledge, certainly not to any expertise. And lacking capacity to evaluate the statements in the various articles mentioned, I do not offer them as gospel. I suspect there are few judges here or elsewhere in the country who are qualified to speak authoritatively on the medical phases of the problem. But the limited judicial knowledge and the lack of assistance given us by the actual record submitted are the very reasons why broadening of the scope of legally permissible abortions who promulgated the statute, *i.e.*, the Legislature. I am as certain as any human can be that the legislators never intended to authorize abortion simply because of rubella occurring in the first trimester of a woman's pregnancy. If abortion of that type is to be regarded as supported by justifiable cause, those public policymakers who created the criminal offense should be regarded by the courts as having the primary right to say so. A Legislature is much better equipped to reach an informed judgment on such a controversial and emo-

tional matter. It can study the problem by means of a committee of its own, which would seek information and advice from experts in obstetrics, gynecoloy and fetology. Predilections of judges in such a sensitive policymaking area of the criminal law are no substitute for educated judgment.

Under all the circumstances of this case, in my judgment it would have been a crime for Doctor Cosgrove or Dolan or any other New Jersey physician to abort the normal pregnancy of Mrs. Gleitman because she had had rubella in the first trimester of her pregnancy. Consequently, the defendants did not violate any legal duty which would make them liable in damages to her or her husband or their child, even if they failed to advise her of the possibility that her child might be defective, and that there were places where she could have an abortion performed, if she elected to do so.

Furthermore, as I suggested above, no such abortion has ever been sanctioned as lawful in any other state. The contrary appears to be the case, and even more strongly so than in New Jersey, because in all but a minimal number of states, by express statutory provision, preservation of the life of the mother is made the only excuse for abortion. But, even if there were some state or foreign country where an abortion for rubella were lawful, in the face of the present strong public policy of New Jersey against such an abortion, no cause of action for damages should be recognized in New Jersey if a local physician did not advise his patient that some such forum existed.

Accordingly for the reasons expressed by Justice Proctor, as well as the additional grounds set forth herein, I agree that the order of the trial court dismissing the plaintiffs' claim should be affirmed.

JACOBS, J. (dissenting).

When Mrs. Gleitman told her obstetricians that she had German measles (rubella), they were placed under a clear duty to tell her of its high incidence of abnormal birth. That duty was not only a moral one but a legal one as well. Cf. Salgo v. Leland Stanford Jr. University, 154 Cal. App. 2d 560, 578, 317 P. 2d 170, 181 (1957); Mitchell v. Robinson, 334 S. W. 2d 11, 18 (Mo. Sup. Ct. 1960); Natanson v. Kline, 186 Kan. 393, 350 P. 2d 1093, 1101, rehearing denied 187 Kan. 186, 354 P. 2d 670 (1960); Dowling v. Mutual Life Insurance Co. of New York, 168 So. 2d 107, 116 (La. Ct. App. 1964), certiorari denied 247 La. 248, 170 So. 2d 508 (1965); DiRosse v. Wein, 24 A. D. 2d 510, 261 N. Y. S. 2d 623, 624, leave to appeal denied 16 N. Y. 2d 487, 264 N. Y. S. 2d 1030, 212 N. E. 2d 447 (1965); Annot., 79 A. L. R. 2d 1028 (1961). If the duty had been discharged, Mrs. Gleitman could have been safely and lawfully aborted and have been free to conceive again and give birth to a normal child. Instead she was told, according to her testimony which the majority assumes for present purposes to be true, that her child would not be at all affected. In reliance on that she permitted the pregnancy to proceed and gave birth to a child who is almost blind, is deaf and mute and is probably mentally retarded. While the law cannot remove the heartache or undo the harm, it can afford some reasonable measure of compensation towards alleviating the financial burdens. In declining to do so, it permits a wrong with serious consequential injury to go wholly unredressed. That provides no deterrent to professional irresponsibility and is neither just nor compatible with expanding principles of liability in the field of torts. See Ekalo v. Constructive Serv. Corp. of America, 46 N. J. 82, 93, 215 A. 2d 1 (1965); Falzone v. Busch, 45 N. J.

559, 214 A. 2d 12 (1965); Smith v. Brennan, 31 N. J. 353, 157 A. 2d 497 (1960).

While the wrong was done directly to Mrs. Gleitman, in truth and reality it vitally affected her entire immediate family. Her husband's standing and injury alongside her should be self-evident since he was as intimately concerned with the pregnancy and its consequences as was his wife. See Ekalo v. Constructive Serv. Corp. of America, supra, 46 N. J., at p. 93, 215 A. 2d 1. And while logical objection may be advanced to the child's standing and injury, logic is not the determinative factor and should not be permitted to obscure that he has to bear the frightful weight of his abnormality throughout life, and that such compensation as is received from the defendants or either of them should be dedicated primarily to his care and the lessening of his difficulties. Indeed, if this were suitably provided for in the ultimate judgment, the technical presence or absence of the child as an additional party plaintiff would have little significance.

I find no substantial basis for the majority's notion that it would be "impossible" for the court or jury to deal properly with the matter of compensatory damages. The plaintiffs' thesis, which a jury could reasonably accept, is that, were it not for the breach of duty, the pregnancy would have been lawfully terminated and the plaintiffs would have been spared not only the incalculable emotional distress but also the readily measurable medical and maintenance expenses causually related to the abnormality. Surely a judicial system engaged daily in evaluating such matters as pain and suffering, which admittedly have "no known dimensions, mathematical or financial" (Botta v. Brunner, 26 N. J. 82, 95, 138 A. 2d 713, 720, 60 A. L. R. 2d 1331 (1958)), should be able to evaluate the harm which proximately resulted from the

breach of duty. Indeed, even if there were more evaluation complexities than are truly present here, they would not furnish any sound basis for the total denial of recovery. See Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 51 S. Ct. 248, 75 L. Ed. 544 (1931); Martin v. Bengue, Inc., 25 N. J. 359, 373, 136 A. 2d 626 (1957); Jenkins v. Pennsylvania R. R. Co., 67 N. J. L. 331, 334, 51 A. 704, 57 L. R. A. 309 (E. & A. 1902). In the *Story Parchment Co.* case the Supreme Court expressed the following thoughts which bear emphasis here:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. Eastman Kodak Co. [of New York] v. Southern Photo [Materials] Co., 273 U. S. 359, 379, 47 S. Ct. 400, 71 L. Ed. 684, [691]. Compare The Seven Brothers (D. C.) 170 F. 126, 128; Pacific [Steam Whaling] etc. Co. v. Alaska Packers' Ass'n, 138 Cal. 632, 638, 72 P. 161." 282 U. S., at p. 563, 51 S. Ct., at p. 250, 75 L. Ed., at p. 548.

The majority rests its rejection of the plaintiffs' action not only on its expressed difficulties with damages but also on its views as to the State's "public policy." But there is no policy favoring the breach of duty here or its immunization. Nor is there any dispute that the Gleitmans could have terminated the pregnancy lawfully outside New Jersey, at least in some foreign country. While the majority does not pass on the issue, I believe that the pregnancy could also have been terminated lawfully within New Jersey. It should be borne in mind that Mrs. Gleitman had rubella during the first or second month of her pregnancy; studies have indicated that the danger of grave abnormality is highest when the rubella is contracted that early, with some estimates running as high as 60 per cent. See 287 The Lancet 373 (1964). During the first trimester, which was well before any quickening, the pregnancy could have been humanely terminated by an operation which is well-recognized in medication circles as "painless, simple and safe." See Guttmacher, "An Obstetrician-Gynecologist Examines New York's Abortion Law," December 5, 1966.

In State v. Cooper, 22 N. J. L. 52 (Sup. Ct. 1849), the termination of pregnancy before any quickening was held not to constitute a criminal offense at common law. During the year of *Cooper*, a New Jersey statute was enacted declaring abortions performed maliciously or without lawful justification to be criminal without regard to quickening. L. 1849, p. 266. But at that time in history, all abortions were considered medically dangerous, and the design of the statute, according to contemporaneous judicial expressions, "was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts." State v. Murphy, 27 N. J. L. 112, 114 (Sup. Ct. 1858).

It is highly significant that, although New Jersey's abortion statute has been amended from time to time, its scope has always been expressly confined by the Legislature to abortions performed "maliciously or without lawful justification." See L. 1849, p. 266; L. 1872, p. 45; L. 1881, p. 240; L. 1898, p. 827; R.S. 2:105-1; N.J.S. 2A:87-1, N.J. S.A. At no time has the New Jersey Legislature departed from its general terminology by specifically defining, as many other state legislatures have, the particular situations which would constitute lawful justification. In State v. Brandenburg, 137 N. J. L. 124, 127, 58 A. 2d 709 (Sup. Ct. 1948), Chief Justice Case indicated no doubt that preserving the mother's life would be justification although he declined to express any opinion as to whether preserving her health would suffice. In Massachusetts, the courts have assumed that under comparable legislative terminology, abortions are permissible to save the mother's life "or to prevent serious impairment of her health, mental or physical". Commonwealth v. Brunelle, 341 Mass. 675, 171 N. E. 2d 850, 852 (1961). And in our own State it is well-known that abortions have been and are being performed in good faith by highly qualified physicians in highly reputable hospitals, when necessary to preserve the life or health of the mother, or to preclude the quickening of the fetus in rubella cases and the like. See Waugh, J., in Sanitary Vendors, Inc. v. Byrne, 72 N. J. Super. 276, 287, 178 A. 2d 259 (Law Div. 1962), affirmed 40 N. J. 157, 190 A. 2d 876, 96 A. L. R. 2d 948 (1963).

After a painstaking study of current medical and legal practice and thought, the reporters of the American Law Institute submitted a proposed penal code permitting termination of pregnancy where the physician believes that continuance would gravely impair the physical or mental

health of the mother, or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape or incest. Model Penal Code (Tentative Draft No. 9, May 8, 1959) § 207.11, p. 144. See also Model Penal Code (Proposed Official Draft, May 4, 1962) § 230.3, p. 189. They also suggested that this result might be reached by judicial interpretation of statutes which prohibit unlawful abortion "without defining what is unlawful." Tentative Draft No. 9 at p. 154.

When the New Jersey Legislature enacted its abortion statute, it was clearly altering and not speaking in terms of the common law under which all terminations of pregnancy before quickening were non-criminal. It could have but did not speak in absolute prohibitory terms. Similarly it could have but deliberately chose not to confine the statutory exception to the preservation of the mother's life or to any other specific and defined grouping. Instead it used the phrase "maliciously or without lawful justification" (N.J.S. 2A:87-1, N.J.S.A.), thus necessarily leaving the matter to interpretation by the judiciary; it took much the same course in N.J.S. 2A:170-76, N.J.S.A., where it prohibited the utterance of abortifacients "without just cause." While it must have contemplated that the judiciary would endeavor to carry out the over-all legislative purpose, it must also have contemplated that interpretation of its broad and flexible terminology would appropriately be made from time to time in the light of prevailing conditions. See State v. Hudson County News Co., 35 N. J. 284, 173 A. 2d 20 (1961); Sanitary Vendors, Inc. v. Byrne, supra, 40 N. J. 157, 190 A. 2d 876, 96 A. L. R. 2d 948; 2 Sutherland, Statutory Construction §5102 (3d ed. 1943); cf. Pirkey Bros. v. Commonwealth, 134 Va. 713, 114 S. E. 764, 29 A. L. R. 1290 (1922), where the court, in sustaining an ancient Sunday law prohibiting labor other

than "work of necessity or charity," pointed out that the statutory exception "must be construed with reference to the conditions under which we live." See N.J.S. 2A:171-1, N.J.S.A.; see also State ex rel. Heck's Inc. v. Gates, 149 W. Va. 421, 141 S. E. 2d 369, 378-379 (1965); cf. N.J.S. 2A:171-5.8, N.J.S.A.; State v. Monteleone, 36 N. J. 93, 175 A. 2d 207 (1961).

In State v. Hudson County News Co., supra, 35 N. J. 284, 173 A. 2d 20, this Court had occasion to deal with N.J.S. 2A:115-2, N.J.S.A., which declares the sale of obscene literature to be criminal when made "without just cause"; as here, the Legislature had not defined the scope of the exception and the court proceeded to do so in the light of modern conditions and considerations. Similarly in Sanitary Vendors, Inc. v. Byrne, supra, 40 N. J. 157, 190 A. 2d 876, this Court gave meaning to the exception in N.J.S. 2A:170-76, N.J.S.A., which prohibits the sale of contraceptives "without just cause"; it concluded that contraceptives may now generally be sold by physicians and druggists but may not be sold promiscuously through vending machines in public places. 40 N. J., at p. 165, 190 A. 2d 876. In both cases the judicial efforts were extended towards sustaining the legislative enactments by giving current content to their general phraseology, thus affording fair warning to those who might thereafter be affected and thereby avoiding any due process attacks. In neither case did any one suggest that the court was precluded by the doctrine of separation of powers from taking that course and that consequently the statute must be stricken in its entirety, a result which courts traditionally strain to avoid. See Grand Union Co. v. Sills, 43 N. J. 390, 408-411, 204 A. 2d 853 (1964); Ward v. Scott, 11 N. J. 117, 122-128, 93 A. 2d 385 (1952).

If, as cited history indicates, the New Jersey Legislature was primarily concerned with the "health and life of the mother" (State v. Murphy, supra, 27 N. J. L. at 114), then surely a therapeutic termination of pregnancy to preserve her life or health may be considered as falling within the contemplation of the statutory exception. And when the legislative purpose and general terminology are viewed alongside current medical science and understanding, a good faith eugenic termination "in accordance with accepted medical standards that an abortion is medically indicated," as the majority opinion phases it, may also properly be considered as falling within the contemplation of the exception. See 2 Sutherland, supra, §5102. Should the Legislature differ with any of this, it is of course at liberty to adopt an enactment clearly expressing its wishes and directions. In the meantime, common fairness to the physicians of New Jersey and those entrusted to their care, suggests that the question not be left open and that any doubts be resolved in favor of the individual's freedom of determination and noncriminality. See 3 Sutherland, supra, §§5604, 5605.

Justice SCHETTINO agrees with this dissent and joins me in voting to reverse the dismissal of the complaint and to remand the matter for trial.

WEINTRAUB, C.J. (dissenting in part).

The legality of a eugenic abortion in New Jersey, which now overshadows the question whether plaintiffs should be compensated, entered this case rather tangentially. If such an abortion were criminal and if also such an abortion performed on a New Jersey domiciliary in a jurisdiction which deems the abortion to be lawful would nonetheless offend the policy of our State, then it would be arguable that our courts should not award

damages against a physician who allegedly deprived a woman of an option thus to violate our statute or its policy by an act done here or elsewhere. The trial court took that view of the matter in directing judgment against the mother and father.

I

The majority opinion finds it unnecessary to decide whether a eugenic abortion runs afoul of our criminal law. Although usually it is good judicial craftsmanship in such circumstances to abstain, especially if an issue is sticky, here the very suggestion that a question remains as to whether a eugenic abortion is criminal will be quite as forbidding as a flat holding that it is.

We know from material available to us that in cases of rubella during the first trimester of pregnancy abortions have been performed in New Jersey by reputable doctors in reputable hospitals, all of whom have believed such abortions to be lawful. In fact every doctor who testified in this case, including the defendants themselves, said that good medical practice requires informing a pregnant woman of the danger of deformity or defect if she has had German measles during the first trimester of her pregnancy, and, there being no other reason suggested for that advice, I assume good medical practice requires it to the end that she may seek an abortion, here or somewhere. When the highest court of the State even intimates the practice may be criminal, I would doubt that a reputable doctor or reputable institution would take the risk. Rather the question will likely be presented by some back-alley abortionist with all the diversion from the merits that a character of that kind can induce. Meanwhile, we can be sure, the pregnant woman who until now has had the services of the highest run

of medical men and the safety of a hospital will deliver herself to dirty hands, if she can afford it, for a woman unwilling to risk the tragedy of rubella is not apt to accept anyone's judgment that she has no more say than a broodmare.

I have difficulty with the constitutionality of the abortion statute, at least as it would be applied here. The statute, N.J.S. 2A:87-1, N.J.S.A., makes guilty of a high misdemeanor any person who "without lawful justification" does any of the forbidden things with the intent to cause a miscarriage. The penalty is severe, the maximum imprisonment being seven years, N.J.S. 2A:85-6, N.J.S.A., unless "the woman or child shall die," in which event the imprisonment may be for 15 years, N.J.S. 2A:87-1, N.J.S.A. The statute, however, does not define "lawful justification"; it does not say what fact—medical, sociological or economic—shall be "lawful justification."

We are not dealing with the delegation of legislative power to administrative agencies, as to which in some situations the Legislature may leave a problem to an agency for detailed solution. See Shelton College v. State Board of Education, 48 N. J. 501, 226 A. 2d 612 (1967). Nor are we dealing with an offense which defies perfect definition so that there inevitably remain marginal areas in which one who enters is nonetheless conscious of a risk. See Boyce Motor Lines v. United States, 342 U. S. 337, 340, 72 S. Ct. 329, 96 L. Ed. 367, 371 (1952). As to the subject before us, it is a simple matter to tick off the specific situations and to state the ones in which "lawful justification" shall be found. Thus we readily know the question is whether "lawful justification" should exist (1) if there is a substantial risk to the life of the mother; or (2) if there is a substantial risk to the physical or mental health of the mother; or

(3) if there is a like risk that the child will be born with grave physical or mental defect; or (4) if the pregnancy resulted from incest or rape (common law or statutory); or (5) if the mother is unmarried; or (6) if there will be economic or sociologic hardship; or (7) if the woman consents, for any or no reason. The Model Penal Code, §203.3 (Proposed Official Draft, May 4, 1962), states specifically what constitutes justification, and lists essentially the first four factual patterns I have just set forth. Thus there is no reason why a legislature could not itself say what shall constitute justification.

There are two constitutional facets to legislative vagueness or ambiguity. One concerns the individual, who is entitled by due process to a reasonably explicit warning as to what he may not do. The other concerns the division of responsibility between the legislative and judicial branches of government, for although, I have no doubt, the judiciary inevitably has a creative role in deciding civil controversies, I do not believe it has a like responsibility with respect to criminal liability. As to that subject, it is the Legislature which should decide what conduct shall be punishable, and although the judiciary should labor to find the legislative intent and to sustain it within constitutional bounds, it is something else to permit the Legislature to pass the policy decision to the judiciary. The point would be plain if the statute recited in so many words that the legislators were unable to agree upon what ought to be justification for a consensual abortion, and being thus unable to agree, the policy problem is assigned to the Supreme Court of the State with the hope that a majority of the Court will work it out. A delegation, with such frankness, would, I am sure, be refused by the Court, and yet the issue is the same whenever a court is unable to discover *what the Legislature intended* and must

therefore read into the statute what the judge thinks the legislators ought to have agreed upon if they had his wisdom and courage.

In this connection, it is helpful to refer to two recent opinions of our Court. State v. Hudson County News Co., 35 N. J. 284, 173 A. 2d 20 (1961), involved N.J.S. 2A: 115-2, N.J.S.A. which makes it a crime to utter, expose or sell obscene or indecent books, etc., "without just cause." The action was for a declaratory judgment. The phrase "without just cause" was attacked as too vague in terms of the individual's right to be forewarned. The subject being obscenity, as to which all efforts to be precise have failed, the Court correctly recognized the legislative problem and accorded the individual a needed measure of protection by restraining the terms of the statute, first, by requiring a "scienter" consisting of the vendor's actual knowledge of the contents of the book (at p. 295, 173 A. 2d 20), and, second, by concluding that "just cause" exists "where the nature of the possession and distribution is not related to the appeal to prurient interest" (at p. 297, 173 A. 2d, at p. 27), thereby finding concreteness for the phrase "without just cause" in the very subject of the legislative ban, obscenity.

More troublesome, in my view, is N.J.S. 2A:170-76, N.J.S.A. which makes it a disorderly persons offense to expose for sale or sell contraceptives "without just cause." This statute was sustained in Sanitary Vendors, Inc. v. Byrne, 50 N. J. 157, 190 A. 2d 876, 96 A. L. R. 2d 948 (1963). Again, as in the case just discussed, the attack was in terms of due process, that is, the individual's right to forewarning, and not in the further terms of separation of the powers of government. There this Court found the legislative intent was to deal with the mode of vending, rather than to prevent a sale, and holding that the Legis-

lature mean no more than to ban a mode of vending that would aid parties to illicit sexual relations, the Court concluded that a sale by vending machine was bad whereas a sale across the druggist's counter was not. The Court thought the situation was "non-marginal" and noted that a judicial statement of the statute's meaning in a declaratory judgment proceeding served to give the individual ample warning for the future. But in *Sanitary Vendors* there seems not to have been raised the question whether the statute was just an incomplete act of legislation whereby the Legislature passed to the judiciary for gestation the touchy subject of contraception.

Contraception and abortion have this in common, that whereas in most areas of criminal prohibition the fact of evil is evident to most people, here there is evil or none at all depending wholly upon a spiritual supposition, for while men agree it is wrong to take life, yet knowing nothing about the void before or after their earthly presence, they cannot agree upon the point at which a living thing should be thought to be human in its being. We know there is "life" in the ovum and sperm before conception, but as to the morality of contraception, every argument starts from and returns to an ethical or religious assumption. Hence he who opposes and he who supports contraception is equally sure he serves the dignity of man. And so as to abortion, men cannot agree upon the stage at which an embyro or fetus has a claim to acquire life in human form strong enough to override a woman's right to her own bodily integrity. It is not surprising, therefore, that as to both contraception and abortion, the legislators were able to agree only upon such vagueness as "without just cause" and "without lawful justification."

I have not overlooked the possibility that the Legislature meant by "lawful justification" to refer to the justification

available with respect to the common-law crime and thus spoke with specificity. I think that thesis cannot be accepted.

The common-law crime had a different object in view. The common-law offense was designed to protect the life of the fetus, and upon the postulate that life began when the fetus stirred in the mother's womb, it was an abortion thereafter which alone was criminal. State v. Cooper, 22 N. J. L. 52 (Sup. Ct. 1849). The statute, which was enacted in 1849 (L. 1849, p. 266), the year of the *Cooper* decision, had a different, or at least still another, objective; it was to protect the pregnant woman in her life and in her health, and to that end the statute made the abortion a crime on the part of third persons, whether the child was quick or not. So in State v. Murphy, 27 N. J. L. 112, 114-115 (Sup. Ct. 1858), the court said:

> "• • • The design of the statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts."

and that:

> "• • • No act of hers is made criminal by the statute. Her guilt or innocence remains as at common law. Her offence at the common law is against the life of the child. The offence of third persons, under the statute, is mainly against her life and health. The statute regards her as the victim of crime, not as the criminal; as the object of protection, rather than of punishment."

This view has been repeated in a series of cases since then.[1]

The statutory objective being different, we ought not to assume that the Legislature meant by "lawful justification" to refer to the justification the common law devised with respect to a common-law offense created to serve another value. If the common law, being concerned solely with the *life* of the fetus, recognized only the preservation of the *life* of the mother as justification for the destruction of a fetus that is quick, we could not safely conclude that the statute intended, at least before the fetus is quick (and that is the situation involved in this case), that the sole justification for an abortion would be the preservation of the life of the mother. If the preservation of the *health* of the mother was within the object of the statute, the statute would be turned against her if she could not have terminated a pregnancy which is a threat to her health equal to or greater than the health risk in the abortion. The question whether the woman's health may justify an abortion under the statute was expressly left open in State v. Brandenburg, 137 N. J.

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[1] *State* v. *Hyer*, 39 N. J. L. 598, 600 (Sup. Ct. 1877); *State* v. *Gedicke*, 43 N. J. L 86, 89 (Sup. Ct. 1881); *State* v. *Loomis*, 89 N. J. L. 8, 9, 97 A. 896 (Sup. Ct. 1916), affirmed 90 N. J. L. 216, 100 A. 160 (E. & A. 1917); *State* v. *Mandeville*, 89 N. J. L. 228, 231, 98 A. 398 (E. & A. 1916); *In re Vince*, 2 N. J. 443, 450, 67 A. 2d 141 (1949); *State* v. *Siciliano*, 21 N. J. 249, 258, 121 A. 2d 490 (1956). The statute of 1849 provided for greater punishment if the woman died. By L. 1872, c. 337, p. 45, the act was amended to provide for greater punishment if either the woman or the "child" should die. *Siciliano* lists "the protection of the unborn child" as an objective along with the protection of "the life and health of the mother." Whether "child" includes every fetus that is quick is not immediately clear, but if it does, it is still the object of the statute to protect the mother's health.

L. 124, 127, 58 A. 2d 709 (Sup. Ct. 1948). I note that when the Massachusetts statute read as our statute reads, protection of her health was found to be lawful justification. Commonwealth v. Wood, 77 Mass. 85 (Sup. Jud. Ct. 1858); see Commonwealth v. Brunelle, 341 Mass. 675, 171 N. E. 2d 850 (Sup. Jud. Ct. 1961).

Further, it is so easy to state what shall be justification that it is unlikely the legislators, if they were in agreement, would have expressed it by such indirection, especially since the common law itself was rather obscure upon the topic.[2] The vast majority of the State legislatures defined justification in explicit terms.[3]

In any event, if "lawful justification" does refer to the common law, the question would remain whether we could find in the common law the answer to the question whether a eugenic abortion is justifiable. The reason is that the common-law judge never dealt with the question. Then (and as well in 1849 when the statute was adopted) there apparently was no medical basis to anticipate a defective offspring. The ravages of rubella were first established in 1941, and the hazards of X-ray and certain drugs are also recent discoveries. Accordingly we cannot know how the

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[2] It is generally assumed in expressions since the American Revolution that the common law deemed the preservation of the life of the mother to be justification. See 3 Burdick, Law of Crimes (1946), § 871, p. 287. I accept that proposition for present purposes although I have not come upon either a decision or a treatise written prior to the American Revolution which states what constitutes justification.

[3] The abortion statutes in most States specify the life of the mother, with a few adding a threat to her health. See the exhaustive comment in Tentative Draft No. 9 of the Model Penal Code (May 8, 1959), p. 146.

common-law judge would have dealt with such a situation, even if the fetus were quick.

For these reasons I have grave doubt that the statute contains a full legislative decision. The Comment in the Model Penal Code (Tentative Draft No. 9, May 8, 1959) suggests that a court might find it permissible to abort a probably defective offspring under the few statutes which prohibit "unlawful" abortions (pp. 153-54). Perhaps so, and if it is, it would be equally true of a statute which speaks of "lawful justification." At any rate, I could not conclude the statute expresses a discernible legislative intent to make such an abortion criminal. In an area in which so many disagree with honor, in which, even in States which define justification in terms of the life of the mother, there has been widespread belief that a eugenic abortion in such circumstances is lawful.[4] I am not willing to find that it is not. I believe pregnant women would not accept that decision unless their ethical or religious conviction accorded with it. For the others, if they could afford the illegal abortion, the result would be all the risks of that business. I would leave it to the Legislature to condemn such an abortion if it is so minded.

II

* * * * *

As to the mother and father, the situation is different. I think the option to abort is hers, and that a wrong is

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[4] The Comment to the Model Penal Code (Tentative Draft No. 9, May 8, 1959), speaking of such abortions, states that "Despite the uncertain status of eugenic as distinguished from therapeutic abortions, such operations are regularly performed by responsible physicians in hospitals throughout the country." (at p. 154.) See also Kummer and Leavy, "Therapeutic Abortion Law Confusion," 195 Journal of American Medical Ass'n 140 (1966).

done her (and derivatively her spouse) if she is not told of the risk or is assured there is none. Defendants say they did advise her, and of course we do not pass upon the factual dispute between them and her. The question is whether she was entitled to have the jury find where the truth lies, and hence the question before us is only whether she would be entitled to recover if she satisfied a jury (1) that, as she claims, she was told there was no risk of a defective child and (2) that she would have elected an abortion if she had been correctly informed.

Troublesome, however, is the measure of damages. Two major elements come to mind at once—the cost of medical care and the cost of maintenance of the child who is so deformed or defective as to require special care.

In a case of tortious injury the right to cure and care belongs to the injured party, and basically that is equally true if the injured person is a child even though a parent who pays for cure or care pursuant to the duty the law imposes upon a parent may sue in his own name to recover that loss. In the usual case, the parent's claim, at least in its inception, is derivative and dependent upon the accrual of a right in the child. See Orr v. Orr, 36 N. J. 236, 239, 176 A. 2d 241, 91 A. L. R. 2d 906 (1961). In a sense the parent is subrogated *pro tanto* to the child's cause of action. If here the parent's claim is viewed in these conventional terms, there can be no recovery for the expense of cure or care because defendants did not injure the child.

But there is an injury to the mother, and the question is whether a claim for the infant's cure and care can be said to flow from that injury. Even though there is an obvious connection between the loss of the option to abort and those costs, it seems to me that the parent's claim for the infant's cure and care must ultimately presuppose it

would have been to the child's own interest not to have been born. The claim for cure and care is the child's, whether it is asserted on the child's behalf against a wrongdoer or against the mother or father or anyone else who in law must furnish it, and when a parent seeks to shift that burden to a tortfeasor, it must be, I think, upon the premise that the tortfeasor did a wrong to the child. If the child's estate bore the cost of cure and care as in some cases it might, the child could not recover that cost from the physician for the reason already given. It would be anomalous to say that a physician, although not liable to an infant who incurred that dollar loss, must pay for it when someone else, whether father, mother, other relative, or the State itself, incurs the expense.

But in other respects the mother is hurt in her own right by the denial to her of her option to accept or reject a parental relationship with the child. The father, too, although his right is wholly dependent upon the mother's decision, is so directly concerned in her decision that he may fairly be regarded as a victim of a wrong done to her. No doubt it would be difficult to assess the amount of the injury, but the law should try to compensate for it, if only to reinforce the duty of due care. I would permit the trier of the facts to put a price on the loss of that option.

I would stress that the valuation could not be made by contrasting the defective child with a normal one, because that was not the option. We cannot go on the hypothesis that the mother would have had the abortion and thereafter conceived and delivered a healthy child. We are dealing with human beings and not with fungibles, and the damages are those suffered with respect to this child. The pain of the parents must be measured against the joy they find in him as he is.

It would be difficult to strike a net balance between the intangible pluses and minuses in a parent-child relationship, and it would be the rare case in which a parent would testify that it is his or her present wish that the child had not been born. No one who has witnessed the love of a parent for an imbecile could expect so crass a computation from the parent's lips. But I believe that even without such testimony an outsider could evaluate the injury, and I would recognize a right in the parents to seek that evaluation, subject to careful judicial supervision, in order to support the woman's right to choose whether to risk this misfortune.

SUPREME COURT, U. S.

MAY 16 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1289

DANIEL MORIN and JANET MORIN,

Petitioners,

—versus—

VICTOR S. GARRA, FELIX H. VANN, and WILLIAM C. SOULE, co-partners,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinions below are adequately set forth in the Petition.

Jurisdiction

The respondents submit that the Court lacks jurisdiction to grant the petition on the ground that petitioner

failed to present the constitutional issues in the procedural manner provided by the laws of New Jersey and that the decision below rests upon an independent and adequate state ground. The basis for these contentions is set forth below in the Argument.

Questions Presented

I. Whether the Court has jurisdiction to grant the petition.

A. Has petitioner failed to comply with State procedural requirements in presenting the constitutional issue to this Court.

B. Whether the opinion below rests upon an independent and adequate state ground.

II. Whether the issues presented are better directed to the Legislatures of the various states for consideration.

III. Whether the decision in *Griswold* v. *Connecticut* should be applied to the issues in this case.

Statute Involved

It is respondents' position that no statute is involved in the case before the Court.

Statement of the Case

This case involved an appeal from the entry of judgment on the pleadings or summary judgment. Plaintiffs alleged medical malpractice because of a failure by physicians to advise an expectant mother of the possibility of a therapeutic abortion. The trial court ruled that this complaint was controlled by *Gleitman* v. *Cosgrove*, 49 N. J. 22, 227 A. 2d 689 (1967), and, accordingly, no cause of action existed.

Petitioner's "Statement of the Case" is a curious piece, totally inappropriate to an appellate brief. Throughout this part of the brief, as well as the argument portion, there is reference to facts which were neither alleged nor proven at the trial level of this litigation. The only pleadings before the trial court were the complaint, the answer, the pretrial order, and briefs of the opposing attorneys, none of which contained the "Statement of the Case" petitioner now seeks to put before this Court.

The complaint consists of nine counts, listing the infant and his mother and father as plaintiffs. In paragraph one of the first count it is alleged, and was admitted, that the defendant Garra was a licensed practicing physician in New Jersey, with offices in Rochelle Park and hospital associations. Paragraph two alleges that the defendants Vann and Soule were physicians, specializing in obstetrics and gynecology with offices in Englewood and hospital associations. This was admitted. The third paragraph of the first count of the complaint alleges that on July 4, 1964, Mrs. Morin visited Dr. Garra and engaged him to provide medical services regarding her pregnancy and a rash "at that time". In Dr. Garra's answer he concedes that he saw Mrs. Morin on a certain occasion. Paragraph two of the second count alleges that on August 5, 1964, Mrs. Morin visited Dr. Soule to engage him and Dr. Vann in connection with her pregnancy. These defendants conceded in their answer that they undertook to treat the mother on certain occasions. There also appears in the complaint allegations that the female plaintiff later bore the infant plaintiff. There are no other factual allegations in the complaint.

The charge in the complaint of failure by the defendants to carry out a legal duty owing to the plaintiffs is that the defendants had a duty

> "to inform the female plaintiff of the serious risk and possible serious hazard in her condition. . . . to afford the female plaintiff an opportunity of being informed so that she might intelligently elect a course of therapy, so that no harm would come to the female plaintiff or her unborn child. . . ."[1]

Plaintiffs also allege in the complaint that the defendants warranted that the pregnancy would be all right.

There are also derivative claims by the parents.

At the pretrial conference plaintiffs further specified their legal claim. The crucial allegations against the defendants are listed in plaintiff's pretrial memorandum which was made part of the order. There it is stated that the defendants:

> ". . . failed and neglected to warn the female plaintiff of the high probability that harm would come to her unborn fetus as a result of her being inflicted with rubella during the first trimester of her pregnancy, and did fail to recommend abortion as an indicated and proper course of treatment, so that harm did come to her unborn fetus arising out of such failure and negligence of this defendant . . ."[2]

Based upon the indistinguishable case of *Gleitman* v. *Cosgrove, supra,* defendants moved for judgment on the pleadings pursuant to R.R. 4:12-3 and for summary judgment pursuant to R.R. 4:58-1 *et seq.*

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[1] Appendix to Appellant's brief in the Superior Court of New Jersey, Appellate Division, p. 5a.

[2] Appendix to Appellant's brief in the Superior Court of New Jersey, Appellate Division, p. 22a.

Defendant's motion was granted by the Honorable Paul R. Huot on November 17, 1967.[3] Clearly in his oral opinion, Judge Huot recognized the controlling effect of the *Gleitman* decision and in so ruling noted that no cause of action existed.

ARGUMENT

I.

The Court lacks jurisdiction to grant the petition.

A. Petitioners failed to comply with State procedural requirements in presenting the constitutional issues to this Court.

It is essential to the jurisdiction of the Supreme Court under 28 U. S. C. A. §1257(3)[4] that a substantial federal question be properly raised in the State court proceedings. *Beck* v. *Washington*, 369 U. S. 541, 550-54 (1962), reh. den. 370 U. S. 965 (1962). In general, the litigant is compelled to follow applicable state procedures in raising the federal question and failure to do so is fatal to Supreme Court review. This is true even where the highest State Court is silent on the federal question. The Supreme Court assumes, without an affirmative showing to the contrary, that

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[3] Appendix to Petition, p. 4a-6a.

[4] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . .

(3) By writ of certiorari, . . . where . . . any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

the silence is due to a procedural deficiency. *Bailey* v. *Anderson,* 326 U. S. 203 (1945), reh. den. 326 U. S. 691 (1945).

A review of petitioner's attempt to present a federal issue to this Court through the New Jersey courts demonstrates the failure to comply with applicable state procedural rules. When plaintiff appealed to the Appellate Division of the New Jersey Superior Court, the brief filed by appellants raised no constitutional claim nor made any constitutional arguments.[5] Indeed, the Petition for Certification to the New Jersey Supreme Court raised no constitutional issue before that Court.[6] Only when petitioner filed a Supplemental Petition for Certification were constitutional issues brought to the attention of the Court.[7] The petition was denied without opinion on December 10, 1968.

This procedure does not comply with New Jersey rules relating to the presentation of issues before the New Jersey Supreme Court. Our highest Court has stated that it can consider only those questions presented to and passed upon by the Appellate Division of the Superior Court, *Gibralter Factors Corp.* v. *Slapo,* 23 N. J. 454, 129 A. 2d 567 (1957), app. dis. 355 U. S. 13 (1957); *Salisky* v. *City of Garfield,* 132 N. J. L. 144, 39 A. 2d 70 (E. & A. 1944). The failure of petitioner to perfect or even discuss any constitutional issues before the Appellate Division would effectively constitute a waiver of any constitutional claim to New Jersey's highest Court.

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[5] See Appellant's Brief in the Superior Court of New Jersey, Appellate Division.

[6] See Petition for Certification to the Supreme Court of New Jersey.

[7] See Supplemental Petition for Certification to the Supreme Court of New Jersey.

Moreover, it is clear that the New Jersey Supreme Court did not consider the constitutional claim as properly before it. The Rules of the New Jersey Supreme Court have been held to mandate consideration of properly presented constitutional claims. N.J.R.R. 1:10-4(e); *Tidewater Oil Co.* v. *Mayor etc. of the Borough of Carteret,* 44 N. J. 338, 209 A. 2d 105 (1965). Therefore, the Supreme Court implicitly ruled that a proper constitutional question was not before it by denying the Petition for Certification.

This failure to proceed according to State practice which has been acknowledged by the New Jersey Supreme Court itself, is fatal to the petition to this Court. This defect is jurisdictional, and it would appear the constitutional claim asked to be decided by the New Jersey Supreme Court was a mere afterthought. Such practice is not condoned in this court as stated in *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648, 655 (1897):

> "the jurisdiction of this Court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

Clearly, the present record demonstrates otherwise. After failing to appeal any constitutional question to the Appellate Division of the Superior Court of New Jersey, failing to petition to the Supreme Court of New Jersey on the basis of a constitutional question, can petitioner now be heard to say that State procedures have been satisfied or that the New Jersey Courts have been given a chance to rule on a constitutional issue? The obvious negative response demands the present petition be denied for lack of jurisdiction.

B. The opinion below rests upon an independent and adequate state ground.

It is unquestioned that the Supreme Court will not review a state court judgment based upon an adequate and independent non-federal ground, even though a federal question might have been involved and perhaps wrongly decided. *Fox Film Corp.* v. *Muller,* 296 U. S. 207 (1935); *Wilson* v. *Loew's Inc.,* 355 U. S. 597 (1958). So firm is this principle that after a case has been accepted for review and during oral argument it first becomes apparent that the case accepted for review rests upon an adequate state ground, the writ of certiorari will be dismissed. *Wilson* v. *Loew's Inc., supra.*

An analysis of the instant matter and of *Gleitman* v. *Cosgrove, supra,* upon which the trial court relied in deciding this matter, demonstrates convincingly that in fact the decision of the Court rests solely upon an adequate and independent state and common law ground.

At the trial level the Court granted defendants' motion for summary judgment which was premised upon the controlling effect of the New Jersey Supreme Court's decision in *Gleitman* v. *Cosgrove, supra.* The Court stated at the outset of its oral opinion granting defendants' motion with reference to the *Gleitman* case:

> "I will agree that this be disposed of by the Supreme Court."[8]

The Appellate Division of the New Jersey Superior Court affirmed the Trial Court's decision in a *per curiam* opinion which held that "the appeal was controlled by the

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[8] See Appendix in Petition at p. 4a.

decision in *Gleitman* v. *Cosgrove*, 49 N. J. 22 (1967).[9] The New Jersey Supreme Court denied the Petition for Certification.

The instant matter then was decided upon the controlling effect of *Gleitman* v. *Cosgrove, supra,* applying the common law principle of *stare decisis.* Therefore, petitioners are actually asking this Court to review the earlier decision of the New Jersey Supreme Court in *Gleitman* v. *Cosgrove, supra.*

Initially respondents question whether this is proper under the Supreme Court's procedural guidelines. The only issue in the instant matter is whether the Trial Court correctly applied the common law doctrine of *stare decisis.* The Appellate Division held that it had and the case was not certified by the New Jersey Supreme Court.

Petitioners attempt to circumvent the obvious non-constitutional issue involved in the instant matter by questioning the constitutionality of the case relied upon by the Trial Court and Appellate Division. This respondent submits this is contrary to the court's practice of not permitting the party seeking review to challenge rights effectively belonging to another. See *Hanson* v. *Denckla,* 357 U. S. 235, 244 (1958); *Barrows* v. *Jackson,* 346 U. S. 249, 255-59 (1953).

However, not conceding the right, it is still abundantly clear that *Gleitman* itself rests upon an independent and adequate state ground. That ground is best stated in the language used by the Court itself. As to the infant's cause of action, the court stated:[10]

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[9] See Appendix in Petition at p. 2a.

[10] We recognize that petitioner now raises only the parents claim but the New Jersey Courts held the parents claim to be derivative and the controlling state social policy was set forth in consideration of the infant's claim.

"The infant plaintiff is therefore required to say not that he should have been born without defects but that he should not have been born at all. In the language of tort law he says: but for the negligence of defendants, he would not have been born to suffer with an impaired body. In other words, he claims that the conduct of defendants prevented his mother from obtaining an abortion which would have terminated his existence, and that his very life is 'wrongful.'

The normal measure of damages in tort actions is compensatory. Damages are measured by comparing the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence. The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the nonexistence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies. As a recent commentator put the matter:

> '[N]o comparison is possible since were it not for the act of birth the infant would not exist. By his cause of action, the plaintiff cuts from under himself the ground upon which he needs to rely in order to prove his damage' Tedeschi, "On Tort Liability for 'Wrongful Life'," 1 Israel L. Rev. 513, 529 (1966).

> The two cases from other states which have considered the theory of action for 'wrongful life' were brought by illegitimate children for damages caused by their birth out of wedlock, and in both cases policy reasons were found to deny recovery. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N. E. 2d 849 (App. Ct. 1963), cert. denied 379 U. S. 945, 85 S. Ct. 444, 13 L. Ed. 2d 545 (1964), and Williams v. State of New York, 18 N. Y. 2d 481, 276 N. Y. S. 2d 885, 223 N. E. 2d 343 (Ct. App. 1966)
>
> We hold that the first count of the complaint on behalf of Jeffrey Gleitman is not actionable because the conduct complained of, even if true, does not give rise to damages cognizable at law." 49 N. J. at pp. 28-29.

With reference to the parent's claim, the Court also held against them on common law tort grounds.

> "The mother and father stand in a somewhat different position from the infant. They are equally subject to the factual circumstance that no act by the defendants could have decreased the likelihood that the infant would be defective. However, Mrs. Gleitman can say that an abortion would have freed her of the emotional problems caused by the raising of a child with birth defects; and Mr. Gleitman can assert that it would have been less expensive for him to abort rather than raise the child.
>
> A considerable problem is raised by the claim of injury to the parents. In order to determine their compensatory damages a court would have to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged

> emotional and money injuries. Such a proposed weighing is similar to that which we have found impossible to perform for the infant plaintiff. When the parents say their child should not have been born, they make it impossible for a court to measure their damages in being the mother and father of a defective child.
>
> Denial of the claim for damages by adult plaintiffs is also required by a close look at exactly what it is they are here seeking. The thrust of their complaint is that they were denied the opportunity to terminate the life of their child while he was an embryo. Even under our assumption that an abortion could have been obtained without making its participants liable to criminal sanctions, substantial policy reasons prevent this Court from allowing tort damages for the denial of the opportunity to take an embryonic life." 49 N. J. at pp. 29-30.

As noted above, the Court did not reach the question of the constitutionality of the statute or base its decision upon its effect. The Court explicitly set out that it was not necessary to do so.

> "In the view we have taken of the case we need not consider whether the abortion which plaintiffs were denied the opportunity to obtain would have been illegal. Our statute provides criminal sanctions for abortions which are performed 'without lawful justification.' N.J.S. 2A:87-1 and see N.J.S. 2A:170-76. The only justification so far held lawful by our courts is preservation of the mother's life. State v. Shapiro, 89 N. J. L. 319 (E. & A. 1916); State v. Brandenburg, 137 N. J. L. 124 (Sup. Ct. 1948). It may well be that when a physician performs an

> abortion because of a good faith determination in accordance with accepted medical standards that an abortion is medically indicated, the physician has acted with lawful justification within the meaning of our statute and has not committed a crime. See §207.11 Model Penal Code, comment 4, 153-154 (Tent. Draft No. 9 1959) and cf. Sanitary Vendors, Inc. v. Byrne, 40 N. J. 157 (1963)." 49 N. J. at p. 31.

Thus, the decision in *Gleitman* was adequately based upon common law principles of tort law, that is, that state social policy recognized no cause of action for failure to prescribe an abortion and damages were impossible of determination. No constitutional issue was reached nor had to be reached in order that the court render a determination. The majority of the court specifically refused to reach the issue of the criminal statute. In view of that fact, the instant matter, which was held to be controlled by *Gleitman,* rests upon an adequate state ground and therefore, this Court has no jurisdiction to grant certiorari.

II.

The issues presented are better directed to the legislatures of the various states for consideration.

The separation of the authority and responsibility of our judiciary and legislature was conceived by the framers of the Constitution as one of the vital elements in a smoothly functioning federal system. This original intent has been recognized by the Court as both salutary and limiting on the nature of its scope of review. As stated by Justice Frankfurter in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 146 (1940):

> "But Courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the remainder that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'"

Moreover, where the task is more in the nature of refashioning a statute, as in the instant case where petitioners ask that the right to therapeutic abortions be written into the New Jersey statute, the Courts agree that such an undertaking is more "consonant with the task of a congressional committee than with judicial construction." *Federal Trade Commission* v. *Mandel Bros.*, 359 U. S. 385, 390 (1959).

Recently the oft repeated reluctance to enter fields better handled by the Legislature was again voiced in *England* v. *Louisiana State Board of Medical Examiners*, 246 F. Supp. 993 (E. D. La. 1965), aff'd per curiam, 384 U. S. 885 (1966). That case involved whether the State Medical Board of Medical Examiners could enforce certain licensing provisions of the State Medical Practice Act against certain chiropractors practicing within the state. The trial court sustained the Medical Board's determination that the plaintiffs had not complied with the act since they had not graduated from an accredited medical school.[11]

The Court affirmed the judgment below and stated with particular pertinence to the instant case:

> "It may well be that chiropractic is a useful profession and that the requirement of a medical education for chiropractors is not in the public inter-

[11] The trial court found in favor of defendant on the basis of a prior state court decision.

> est. But the balancing of the advantages and disadvantages of this requirement is for the legislature." 246 F. Supp. at p. 997.

See also *Gleitman* v. *Cosgrove, supra* (concurring opinion by Francis, J.); *Dixon* v. *Gassert,* 26 N. J. 1, 9, 138 A. 2d 14 (1958); *Downing* v. *Stewart,* 85 N. J. Super. 62, 203 A. 2d 724 (App. Div. 1964); *Tinsman* v. *Parsekian,* 65 N. J. Super. 217, 221, 167 A. 2d 407 (App. Div. 1961).

As noted in respondents' brief in the Appellate Division and in the Supreme Court of New Jersey, it is obvious the New Jersey Legislature has taken careful consideration of the issue of abortion and has begun to act.[12] As noted in the preamble to a concurrent resolution of the New Jersey Legislature creating a commission to study the New Jersey Statutes relating to abortion and prescribing its powers and duties:

> "Whereas it is a legislative responsibility to reevaluate the existing statutes on abortion to determine whether they adequately protect the public health and welfare and promote effective law enforcement. . . .[13]

Moreover, as the survey of the Association for the Study of Abortion, Inc., indicates, many other states have undertaken similar consideration and reform.[14]

This being, therefore, a problem best considered and resolved by the legislature, the Court should decline to grant certiorari in this matter.

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[12] See Appendix to Respondents Brief p. 1a-3a.

[13] See Appendix to Respondents Brief p. 1a.

[14] See Appendix to Respondents Brief p. 4a-11a.

III.

The case before the Court in no way conflicts with prior decisions of this Court.

Petitioner argues that the present litigation either conflicts or should be controlled by the decision in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965). Although petitioners have alluded to this point, respondents wish to stress that the decision in *Gleitman* v. *Cosgrove, supra,* and the instant matter which relied on that case, in no way rested upon the legal effect of New Jersey's Abortion Law. Justice Proctor in the majority opinion pointed out most clearly that the court did not consider the question of whether the abortion plaintiffs sought would have been illegal. Moreover the Court stated:

> "It may well be that when a physician performs an abortion because of a good faith determination in accordance with accepted medical standards that an abortion is medically indicated, the physician has acted with lawful justification within the meaning of our statute and has not committed a crime." 49 N. J. at p. 31.

Therefore, *Griswold,* which held that the *enforcement of a statute* prohibiting the dissemination of contraceptive information to married couples was unconstitutional, is not applicable to the instant case. The enforcement of a statute is not the issue in the present matter, for it was decided upon traditional concepts and principles of the common law of negligence. Consequently the holding of *Griswold* in no way conflicts or requires this Court's consideration of the present matter.

Griswold is not applicable for another basic reason. The majority in that decision found that the enforcement of the

Connecticut statute violated certain "fundamental rights of marital privacy." Reference was made to the original plea by James Madison and Mr. Justice Story's analysis of the Ninth Amendment. From these references it is clear that Madison desired to make certain that fundamental rights, not enumerated in the Bill of Rights, would not be construed as being taken away from the people. The present case differs in two respects to the acknowledged sanctity of marital privacy recognized in Madison's time as well as the present.

The right petitioners seek to assert is not and can not be construed to come within these *fundamental* rights recognized in *Griswold*. In fact, the reason why the New Jersey Supreme Court found no cause of action on the part of the parents in *Gleitman* was that what they were seeking contravened all notions of life and liberty.

> "It is basic to the human condition to seek life and hold on to it however heavily burdened. If Jeffrey could have been asked as to whether his life should be snuffed out before his full term of gestation could run its course, our felt intuition of human nature tells us he would almost surely choose life with defects as against no life at all. 'For the living there is hope, but for the dead there is none.'" 49 N. J. at p. 30.

Rather than seeking a fundamental right as in *Griswold* petitioners here seek damages for not being given the opportunity to snuff out their child's fundamental right, his life. See *Griswold* v. *Connecticut, supra,* at p. 493. Such a claim is clearly beyond the holding, rationale and intendment of *Griswold.*

Furthermore it is apparent that what petitioner now seeks to claim as a fundamental right, was not envisaged

as much by Madison in the Ninth Amendment, since at that time the common law also made abortion a crime.[15] Without doubt, the fundamental rights Madison sought to protect would not have included the right here asserted by petitioner.

Finally the opinions of Justice Douglas and Justice Goldberg and Justice Brennan and the Chief Justice in *Griswold* cited Justice Douglas' dissenting opinion in *Poe* v. *Ullman,* 367 U. S. 497 (1961). In that case, Justice Douglas indicates that certain human rights emanate from the specific rights set forth in the first eight amendments. However, Justice Douglas was also quick to point out that even the "family is not beyond regulation" and "the right of privacy most manifestly is not an absolute." *Poe* v. *Ullman, supra,* at p. 552.

And Justice Douglas recognized the State's rightful concern with its citizens' moral welfare. In that context his words are most particularly pertinent to the instant matter:

> "Certainly Connecticut's judgment is no more demonstrably correct or incorrect than are the varieties of judgment expressed in law, on marriage and divorce, on adult consensual homosexuality, *abortion,* and sterilization or euthanasia and suicide. If we had a case before us to decide simply and in the abstract, whether the moral judgment implicit in the application of the present statute to married couples was a sound one, the very controversial nature of these questions would, I think, require us to hesi-

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[15] At common law the crime was not committed unless the child was quick within the mother's womb when the abortion was committed, approximately 14-20 weeks. See Annotation §207.11 Tentative draft, Model Penal Code (1959) 148.

tate long before concluding that the Constitution precluded Connecticut from choosing as it has among these various views. *Poe* v. *Ullman, supra,* at p. 547.

And yet petitioner is asking this Court to review in the abstract the moral judgment of the New Jersey Legislature which is precisely what Justice Douglas thought the Court should not do. Only the pleadings were before the Trial Court below. Neither the Trial Court or the Supreme Court in *Gleitman* ruled on the basis of the abortion statute. Consideration of the constitutionality of that statute on this record could only be done in the abstract. For the reasons set forth above, the Court should decline to do so.

CONCLUSION

For the reasons outlined above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

Assembly Concurrent Resolution No. 24

STATE OF NEW JERSEY

Introduced February 13, 1968

By Assemblymen CRANE, HOLLENBECK, COSTA, DE KORTE, APY, THOMAS, KALTENBACHER and SELECKY

A CONCURRENT RESOLUTION creating a commission to study the New Jersey Statutes relating to abortion and prescribing its powers and duties.

WHEREAS, The high rate of illegal abortions constitutes a serious law enforcement and public health and safety problem;

WHEREAS, Critics of our abortion laws contend that they are unduly restrictive and have a tendency to force persons seeking to have such operations performed to fall prey to the unscrupulous and frequently unskilled abortionist, with possible tragic consequences;

WHEREAS, It is imperative that our statutes in this area operate to effectively prevent resort to illegal abortions; and

WHEREAS, It is a legislative responsibility to re-evaluate the existing statutes on abortion to determine whether they adequately protect the public health and welfare and promote effective law enforcement; now, therefore,

BE IT RESOLVED *by the General Assembly of the State of Jersey* (*the Senate concurring*):

1. There is hereby created a commission to consist of 9 members, to be appointed from the membership of the

Senate by the President thereof, no more than one of whom shall be of the same political party, and 2 to be appointed from the membership of the General Assembly by the Speaker thereof, no more than one of whom shall be of the same political party, and 5 to be appointed by the Speaker of the General Assembly and President of the Senate acting jointly and in the following manner: one representative of the County Prosecutor's Association of New Jersey, one representative of the Medical Society of New Jersey, and three clergymen of [different] faiths. The members of the commission shall serve without compensation. Vacancies in the membership of the commission shall be filled in the same manner as the original appointments were made.

2. The commission shall organize as soon as may be after the appointment of its members and shall select a chairman from among its members and a secretary who need not be a member of the commission.

3. It shall be the duty of said commission to study our statutes relating to abortion and the problem of illegal abortions.

4. The commission shall be entitled to call to its assistance and avail itself of the services of such employees of any State, county or municipal department, board, bureau, commission or agency as it may require and as may be available to it for said purpose, and to employ such stenographic and clerical assistants and incur such traveling and other miscellaneous expenses as it may deem necessary, in

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EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

order to perform its duties, and as may be within the limits of funds appropriated or otherwise made available to it for said purposes.

5. The commission shall have all the powers provided by the provisions of chapter 13 of Title 52 of the Revised Statutes.

6. The commission may meet and hold hearings at such place or places as it shall designate during the sessions or recesses of the Legislature and no later than January 31, 1969, shall report its findings and recommendations to the Legislature, accompanying the same with any legislative bills which it may desire to recommend for adoption by the Legislature.

APPENDIX B

Bills Regulating the Performance of Abortion, Introduced in the 1969 Legislative Sessions

A Summary Report Prepared by the Association for the Study of Abortion, Inc.

ALABAMA

Session convenes May 13, 1969.

ALASKA

No bill.

ARIZONA

SB 69. ALI* (plus, "or the woman was unwed and had not reached sixteen years of age at the time of conception,").

HB 32. ALI (plus, "or the woman was unwed and had not reached sixteen years of age at the time of conception,").

HB 172. ALI.

ARKANSAS

Act 61. New law, ALI—("health"—does not specify physical and mental, four-month residency).

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* Bills so identified include the following indications for lawful abortion (the wording varies): 1. to preserve the woman's life; 2. if the pregnancy endangers her physical or mental health; 3. if there is risk the child, if born, would be abnormal; 4. if the pregnancy resulted from rape or incest.

Appendix B

CALIFORNIA

No bill (new law adopted 1967).

COLORADO

HB 1245. A bill which has as its objective diluting the effectiveness of the 1967 ALI-type law. Apparently does not have much chance of passage.

CONNECTICUT

HB 5490. ALI (plus "that the continuance of a pregnancy, resulting from credible evidence of rape or incest, may constitute a threat to the mental or physical health of the patient"; "No therapeutic abortion shall be performed . . . unless the patient has been a resident of the state of Connecticut for four months or unless the pregnancy occurred while the patient was a resident of this state.")

DELAWARE

No bill.

FLORIDA

HB 11. ALI.

GEORGIA

No bill (new law adopted 1968).

HAWAII

HB 61. ALI.

HB 107. ALI.

Appendix B

HB 204. Licensed physician; licensed hospital.*

IDAHO

No bill.

ILLINOIS

HB 634. Licensed physician; licensed hospital or other licensed medical facility.

INDIANA

No bill.

IOWA

HF 261. ALI.

HF 202. ALI.

SF 502. Provides that abortions may be done only to preserve the woman's health.

KANSAS

SB 9. Licensed physician; licensed and accredited hospital. (Amended to ALI—passed).

KENTUCKY

Next session January, 1970.

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* The wording of bills so identified varies, but, in general they provide that abortions may be performed only by licensed physicians and, where noted, they provide that abortions must be performed in licensed and accredited hospitals.

Appendix B

LOUISIANA

Session convenes May 12, 1969.

MAINE

HP 602. ALI.

MARYLAND

No bill. (New law adopted 1968.)

MASSACHUSETTS

HB 3362. ALI.

MICHIGAN

SB 288. Licensed physician; licensed hospital.

SB 287. ALI.

MINNESOTA

SF 998. Licensed physician (on approval of five-man hospital committee); licensed hospital.*

SF 1025. Licensed physician; licensed hospital.

MISSISSIPPI

No bill.

MISSOURI

SB 206. ALI (minus mental health).

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* Amended to include the phrase, "if the abortion is performed because of medical indications."

Appendix B

MONTANA

No bill.

NEBRASKA

No bill.

NEVADA

AB 259. Licensed physician.

AB 229. ALI (plus "Continuation of the pregnancy may threaten the life of the woman or seriously impair her health and the physician makes such determination after considering the total actual and reasonably foreseeable environment of the woman . . ."). AB 155. ALI (minus mental health; plus provision that patient must petition a district court for permission to have an abortion).

NEW HAMPSHIRE

HB 77. ALI.

NEW JERSEY

Information on this session not yet available.

NEW MEXICO

HB 207. New law—ALI—effective date June 22, 1969.

NEW YORK

A 1061-A. Repeal.

A 1310. Repeal.

S 2857. Repeal.

Appendix B

A 3958. Licensed physician.

A 3473. ALI (plus "the pregnancy occurred while the female was unmarried and fifteen years of age or less" and "the pregnancy of the woman occurred while the woman was declared to be a mentally disabled or incompetent person as defined in the mental hygiene law.") Defeated in the Assembly.

S 3500. ALI (plus, "such female has a severe, permanent and incapacitating physical or mental condition which would render her incapable of caring for the child, if born . . ." and "the pregnancy commenced while the female was unmarried and under sixteen years of age, and is still unmarried . . .").

A 2323. ALI (plus, "such female has a permanent physical or mental condition which would render her incapable of caring for the child, if born . . ."; "the pregnancy commenced while the female was unmarried and under eighteen years of age, and is still unmarried . . ."; "where the female is over forty years of age . . ."; and "where the female already has four living children . . .".

A 240. Life, rape, incest, "the pregnancy occurred while the female was thirteen years of age or less . . ." and "that the pregnancy occurred while the woman was certified as a mentally ill person or a mental defective, as defined in the mental health law."

North Carolina

No bill. (New law adopted 1967.)

North Dakota

HB 319. ALI.

Appendix B

OHIO

HB 71. ALI.

OKLAHOMA

No bill.

OREGON

HB 1311. Licensed physician.

SB 182. Licensed physician.

SB 193. ALI (minus rape and incest provisions, plus "or that the pregnancy resulted from felonious intercourse").

PENNSYLVANIA

No bill.

RHODE ISLAND

1400. ALI (four-month residency requirement).

H 1401. ALI (minus rape and incest; four-month residency requirement.)

H 1402. Rape and incest only indications; four-month residency requirement.

SOUTH CAROLINA

S 32. ALI ("health"—does not specify physical and mental).

SOUTH DAKOTA

No bill.

Appendix B

TENNESSEE

No bill.

TEXAS

HB 323. ALI (woman "is a resident of this state, or became pregnant in this state; or has resided in this state for a period of four months prior to the date of the proposed abortion.").

UTAH

SB 116. ALI.

VERMONT

H 199. ALI ("health"—does not specify physical and mental).

VIRGINIA

Next regular session January, 1970.

WASHINGTON

HB 312. Licensed physician.

W. VIRGINIA

No bill.

WISCONSIN

AB 33. Repeal.

WYOMING

No bill.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1289

DANIEL MORIN and JANET MORIN,

Petitioners,

—versus—

VICTOR S. GARRA, FELIX H. VANN, and WILLIAM C. SOULE, co-partners,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent's *Brief in Opposition* raises two jurisdictional points which omit a great deal of applicable New Jersey law and necessitate a response.

I.

Compliance with procedural requirements for presenting federal questions before the State Supreme Court.

Respondent does not and could not question the timeliness of Petitioner's *Supplemental Petition for Certification and Supplemental Appendix* before the New Jersey Supreme Court which raised each federal question in a proper way. Nor does Respondent deny that Petitioner's *Memorandum in Opposition of Motion for Judgment*[1] filed in the trial court raised the application of *Griswold* v. *Connecticut*[2] and with it the nuances of the Fourteenth and Ninth Amendments.

Rather, Respondent's Point I-A[3] makes the remarkable assertion that:

> "Our highest Court has stated that it can consider only those questions presented to and passed upon by the Appelalte Division . . . ."

To support this novel view of New Jersey law Respondents rely upon a chattel mortgage suit wherein one party

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[1] *See* Petition for Certiorari, p. 7a.

[2] 381 U.S. 479 (1965).

[3] Brief in Opposition, p. 6.

tried to bring in *new facts* before the New Jersey Supreme Court,[4] and a public employment case involving a newly raised nonconstitutional issue of statutory interpretation.[5] The former decision does not lend itself to discussion, resting as it does upon the Anglo-American concept of appellate review. Nor is the latter relevant, having been decided before the New Jersey Constitution of 1947 placed rule-making power in the State Supreme Court, before the rule amendments of 1953—Rule 1:5-3(c) of which effectively interred the rigidity of *Salisky*,[6] and before a substantial line of authority applying Rule 1:5-3(c) to the kind of question presented here.

Illustrative of New Jersey decisions more nearly in point, and contrary to *Salisky*, are the following, includ-

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[4] *Gibralter Factors Corp.* v. *Slapor*, 23 N. J. 459 [not 454], 129 A. 2d 567, *appeal dismissed*, 355 U.S. 13 (1957):

> "[T]he defendants now tender an *ex parte* 'Supplemental Statement of Facts' . . . This belated tender is, of course, rejected." 23 N. J. at 461, 129 A. 2d at 568.

[5] *Salisky* v. *City of Garfield*, 132 N. J. L. 144, 39 A. 2d 70 (E. & A. 1944) (per curiam).

[6] *See Rules Governing the New Jersey Courts* 63 (1968 ed.). Rule 1:5-3(c) states:

> "The court may notice plain error affecting substantial rights of a party, although they were not brought to the atention of the trial court."

As indicated above, "[t]his rule was adopted in 1953." *In re Howard Johnson, Inc.*, 36 N. J. 443, 445, 177 A. 2d 756, 758 (1962). Point I in the Petition for Certiorari, p. 7a, and Point II, by necesary implication, were indeed raised at the trial level. Point III, *id.* at 24, n. 33, was first raised before the State Supreme Court, resting as it did upon an intervening unreported decision.

ing five in which Associate Justice Brennan of this Court participated. Petitioners respectfully bring these to the Court's attention.

They establish an invariable custom, implementing the rule of practice, that novel questions, not raised below, will be entertained when they "relate to matters of great public concern or important questions of public policy." *Meeker* v. *Meeker*, 52 N. J. 59, 65, 243 A. 2d 801, 804 (1968) (7-0) (constitutional challenge to a rule against attacks on foreign divorces where neither party was a New Jersey resident at the time of the decree).

As the late Chief Justice Vanderbilt stated the principle, for the 1952 New Jersey Supreme Court on which Associate Justice Brennan sat:

> "[It] has been fully briefed and argued here by both sides; and, involving as it does both constitutional issues and important questions of public policy, we deem it our duty in the public interest to decide the matter."[7]

An unbroken line of New Jersey cases carries the policy out to this day. Eight decisions supporting this point are set out in the margin, to mention only those from 1951 on.[8]

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[7] *Fischer* v. *Bedminster*, 11 N. J. 194, 201, 93 A. 2d 378, 381 (1952) (federal due process challenge to zoing law).

[8] *WHYY, Inc.* v. *Glassboro*, 50 N. J. 6, 12, 231 A. 2d 608, 611-12 (1967), *rev'd per curiam on the merits*, 393 U.S. 117 (1968) (discriminatory taxation):

> "As this constitutional contention is one of great concern to many . . . the public interest in this question demands that it be decided."

(*Footnote continued from preceding page*)

(*Footnote continued on following page*)

In re Howard Johnson, Inc., 36 N. J. 443, 445-46, 177 A. 2d 756, 758 (1962) (question of applying tax exemption to property of government lessee):

> "The rule takes a more expansive view of the obligation of a judge. It embraces the philosophy that justice is the common burden of both counsel and the court. . . ."

Donnelly v. *Ritzendollar*, 14 N. J. 96, 101 A. 2d 1, 4 (1953) (Vanderbilt, C. J., concurred in by Brennan, J.) (challenge to chancery jurisdiction of county court):

> "Although this issue was not raised below we consider it here in keeping with our policy to do so where 'the questions raised on appeal . . . are matters of great public concern'."

Solomon v. *Jersey City*, 12 N. J. 379, 386, 97 A. 2d 405, 409 (1953) (concurred in by Brennan, J.) (question of municipal taxing power):

> "This issue is of public concern and will be considered here without regard to the suggested limited nature of the contentions advanced by the plaintiffs in the Law Division."

City of Newark v. *Pulverman*, 12 N. J. 105, 108, 95 A. 2d 889, 890 (1953) (concurred in by Brennan, J.) (federal double jeopardy question):

> "The issue is an important one of public concern and ought to be considered; there is no question of our power to do so."

See also In re Stern, 11 N. J. 584, 590, 95 A. 2d 593, 595-96 (1953) (concurred in by Brennan, J.) (late objection to improper remarks by trial judge to jury); *Morin* v. *Becker*, 6 N. J. 457, 79 A. 2d 29 (1951) (Vanderbilt, C. J.) (civil case challenging majority jury verdict); *Howard* v. *City of Patterson*, 6 N. J. 373, 376, 78 A. 2d 893, 894 (1951) (controversy over salary scale of public employees).

A comparison of the instant case, its parallel precedent from 1967, *Gleitman* v. *Cosgrove*,[9] and application of the aforesaid New Jersey practice rule, requires the conclusion that all federal questions in this case have been decided against Petitioners to date. The Appendix to the Petition reprints the *Gleitman* opinions. A plurality rested its result on "substantial policy reasons,"[10] and "countervailing public policy."[11] The concurrence reached the question of applying the abortion statute, and added that this was a "highly charged public policy area,"[12] involving "the public policy against abortion."[13]

Both dissents also characterized the case as one involving "the policy of our State . . ."[14] Justice Jacobs in dissent saw "no policy favoring the breach of duty here or its immunization . . . ."[15]

All seven New Jersey Supreme Court Justices treated the parallel *Gleitman* case as one concerning, to paraphrase the late Chief Justice Vanderbilt, "important questions of public policy, [which] we deem it our duty in the public interest to decide . . . ."[16]

In light of this declared obligation to decide newly raised questions of important public policy on appeal,

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[9] Appendix to Petition for Certiorari, pp. 8a-56a.

[10] *Id.* at 14a.

[11] *Id.* at 15a.

[12] *Id.* at 26a.

[13] *Id.* at 29a.

[14] *Id.* at 44a.

[15] *Id.* at 40a.

[16] *Fischer* v. *Bedminster*, 11 N. J. 194, 201, 93 A. 2d 378, 381 (1952).

one can conclude without a dram of speculation that here the New Jersey Supreme Court indeed passed upon the federal questions, but rejected them on the authority of *Gleitman,* or on their merits. *Stare decisis* is, of course, one of the more *inadequate* state grounds known to federal jurisprudence. *See. e.g., Loving* v. *Virginia,* 388 U. S. 1, 7 (1967); *Martin* v. *Hunter's Lessee,* 14 U. S. (1 Wheat.) 304 (1816).

In addition, the instant case enjoys a higher posture than many of those cited. Petitioners raised the federal constitutional questions in the trial court where they were decided and rejected.[17] In most of the ten cases cited even this was not done. Moreover, the importance under New Jersey public policy of the issues presented is certified by the State Supreme Court in its earlier parallel case. Third, Respondents can hardly claim prejudice as they have been in possession of the fully presented constitutional issues since receiving the *Supplementary Petition for Certification* timely filed in the New Jersey Supreme Court. Finally, Petitioner's partial reliance on intervening decisions of this and other courts, such as *Levy* v. *Louisiana,*[18] is sufficient in itself to avoid any contention of procedural defect. The petition for rehearing of *Levy* was denied on October 14, 1968, ten days after the decision in the instant case by the Appellate Division. Even more significant is the California decision, *Shively* v. *Board of Medical Examiners,*[19] decided one day prior

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[17] *See* Petition for Certiorari, pp. 6-7.

[18] 391 U.S. 68 (1968). *See* Petition for Certiorari, pp. 6, 13, 22.

[19] No. 590333 (Cal. Super. Ct., San. Fran. Cty., Sept. 24, 1968). *See* Petition for Certiorari, pp. 8, 24.

to argument in the Appellate Division, and as yet unreported. Lastly, a case parallel to our own came down on November 27, 1968, in the New York State Supreme Court.[20] It too could not conceivably have been placed before the Appellate Division.[21]

Whether a state procedural ground may bar review in this Court is, of course, a federal question for decision here, not below. *See, e.g., Parrot* v. *City of Tallahassee*, 381 U. S. 129 (1965) (per curiam); *Douglas* v. *Alabama*, 380 U. S. 415, 422 (1965) (Brennan, J. "[T]he adequacy of state procedural bars to the assertion of federal questions is itself a federal question."); *Staub* v. *City of Baxley*, 355 U. S. 313, 318-19 (1958).

The same standard applies in civil as criminal review, for "grave consequences" are often at stake in both. *Konigsberg (I)* v. *State Bar of California*, 353 U. S. 252, 258 (1957).

Even if one makes the rash assumption that the New Jersey Supreme Court used an arguable procedural defect in this case, which it could not have done consistent with past practice and reasonable expectations, our inquiry does not end. Here, as in *Wright* v. *Georgia*, 373 U. S. 284, 291 (1963), "petitioner[s] could not fairly be deemed to have been apprised. . . . Novelty in procedural requirements cannot be permitted to thwart review in this Court . . .'" *Accord, Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964) ("[S]tate procedural requirements which are not strictly or regularly followed cannot [preclude] the right to review.").

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[20] *Stewart* v. *Long Island College Hospital*, 58 Misc. 2d 432, 296 N. Y. S. 2d 41 (Sup. Ct., Kings Cty. 1968). *See* Petition for Certiorari, p. 8.

[21] *Cf. O'Connor* v. *Ohio*, 385 U.S. 92 (1966) (per curiam).

The arguments raised in Point I-A of the Brief in Opposition are thus wholly without merit.

II.

Absence of independent and adequate substantive state law ground for decision below.

Respondent further contends by Point I-B[22] that (1) "[t]he majority of the [New Jersey Supreme Court] specifically refused to reach the issue of the criminal statute,"[23] (2) *"Gleitman* was adequately based upon common law principles of tort law . . .",[24] and (3) "damages were [found] impossible of determination."[25] Together these arguments are said to rest the judgment upon independent and adequate state substantive law grounds.

As to (1), a robe-count from one to seven provides a sufficient answer. *Three* justices sought to avoid the statute's relevance and use public policy.[26] A majority of seven however, would appear to be *four*. Justice Francis wrote a concurring opinion, "preferring to deal more specifically with the problem of criminality of a eugenic abortion . . ."[27] He concluded that an abortion under the stated circumstances would have been a crime,"[28] and went

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[22] Brief in Opposition, pp. 8-13.

[23] *Id.* at 13.

[24] *Id.*

[25] *Id.*

[26] Justices Proctor, Hall and Haneman. *See* Appendix to Petition for Certiorari, p. 16a.

[27] *Id.*

[28] *Id.* at 27a.

so far as to extend his ruling to "all of our sister states where preservation of the life of the mother is the only warrant for an induced miscarriage."[29] It is not accurate then to say that a majority avoided the statutory problem, for one member of that majority felt that the policy position could not stand alone. Moreover, the statutory issue must be resolved to establish the legality of the physician's duty. Otherwise, *illegality* would be an independent and adequate bar to review.

The statute's validity is therefore necessarily before this Court.

Contention (2) requires no answer. The common law of torts must yield to the "Constitution, . . . which shall be . .. the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. CONST. Art. 6. Tort law, whether made by judges or legislators, is state law. This is at least the teaching of *Levy* v. *Louisiana,* 391 U. S. 68 (1968), and the host of "loss-of-consortium" decisions typified by *Hitaffer* v. *Argonne Co.,* 183 F. 2d 811 (D. C. Cir.), *cert. denied,* 340 U. S. 852 (1950). The right to recover in tort could hardly be made to depend upon skin color, political belief, religious affiliation, or intention to obtain an abortion in Japan or elsewhere.

Respondent's final contention, (3), is that the State Supreme Court's position on determination of damages forecloses further review. Petitioners maintain that such a holding departs so grossly from the New Jersey common law of torts and malpractice as to constitute a denial of equal protection. If, in *Levy* v. *Louisiana, supra,* the Louisiana courts had determined that links between

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[29] *Id.*

illegitimate children and their natural parents were so speculative as to justify a denial of damages, this Court would surely have taken the further necessary step. In the present case the lower court carved out a new rule on damages to effectuate an attempted double foreclosure of federal rights. Whether this route of circumvention constitutes a denial of equal protection is a substantial federal question. Indeed, Petitioners reiterate that the right to damages for unconstitutional deprivation of state rights must itself be a federal question upon which this Court should pass.

* * *

Petitioners recognize the limited function of a Reply Brief and regret that such length was necessary to clarify the posture of this case.

Respectfully submitted,

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